CRIMINAL LAW

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I. INTRODUCTION 594
II. HOMICIDE 594
A. First Degree Felony Murder 594
B. Felony Murder with Vulnerable Adult Abuse 596
III. ASSAULTIVE OFFENSES 597
A. Assault 597
B. Assaulting / Resisting / Obstructing a Police Officer 597
C. Assault with Intent to Do Great Bodily Harm / Felonious Assault 600
D. Larceny from the Person 601
IV. CRIMINAL SEXUAL CONDUCT 603
A. Relation to Victim 603
B. Involving Another Felony 605
V. OFFENSES AGAINST PROPERTY 606
A. Armed Robbery 606
B. Breaking and Entering a Vehicle Causing Damage 608
VI. OTHER OFFENSES 609
A. Accosting or Enticing a Minor for Immoral Purposes 609
B. Controlled Substances Act 612
C. Furnishing a Cellular Telephone to a Prisoner 613
D. Obstruction of Justice 615
E. Willful Neglect of Duty by Public Officer 615
VII. THE MICHIGAN MEDICAL MARIHUANA ACT 617
A. Physician's Statement Requirement 617
1. Obtaining Physician's Statement after Arrest 617
2. Obtaining Physician's Statement after Possessing Marijuana 619
B. Definition of "Enclosed, Locked Facility" 621
C. Asserting the MMMA as an Affirmative Defense 623
D. Driving Under the Influence of Marijuana 624
E. Immunity From Prosecution 625
F. Other Statutory Requirements 627
VIII. OPERATING A MOTOR VEHICLE WHILE IMPAIRED 629
IX. DEFENSES 631

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A. Imperfect Self-Defense 631
B. Duty to Retreat 634
X. CRIMINAL ISSUES AT TRIAL 636
XI. SENTENCING ISSUES 639
A. Holmes Youthful Trainee Act (HYTA) 639
B. Mandatory Lifetime Electronic Monitoring 639
C. Restitution 640
XII. DOUBLE JEOPARDY 641
A. Differing Elements of the Offense 641
B. Entry of Directed Verdict of Acquittal 643
XIII. INEFFECTIVE ASSISTANCE OF COUNSEL 646
A. Failure to Advise Client of Collateral Consequences of Plea 646
B. Failure to Object to Erroneous Jury Instructions 647
C. Lack of Meaningful Adversarial Testing 648
XIV. THE MICHIGAN SEX OFFENDER REGISTRATION ACT 652
A. Lack of Residence 652
B. Delayed Ordering of Registration as Sex Offender 654
XV. CONCLUSION 656

I. INTRODUCTION

This *Survey* period[1] provided a varying array of criminal law decisions by the Michigan Supreme Court and Michigan Court of Appeals. This Article examines issues ranging from homicide to registration of sex offenders, and from imperfect self-defense to ineffective assistance of counsel. In addition, this Article includes many decisions interpreting the Michigan Medical Marihuana Act.[2] Overall, criminal law jurisprudence was very interesting this year.

II. HOMICIDE

A. First Degree Felony Murder

In *People v. Orlewicz*, the trial court convicted the defendant of first degree murder,[3] first-degree felony-murder,[4] and mutilation of a dead

1. June 1, 2011 to May 31, 2012.
2. MICH. COMP. LAWS ANN. §§ 333.26421-.26430 (West 2012).
3. *See* MICH. COMP. LAWS ANN. § 750.316(1)(a) (West 2012).
4. *See* MICH. COMP. LAWS ANN. § 750.316(1)(b) (West 2012).

body.[5] The defendant appealed, arguing *inter alia*, that the court should vacate his felony-murder conviction "because there was insufficient evidence that the defendant killed the victim during the commission or attempted commission" of a felony.[6] The "felony in this case was larceny of the victim's gun," which the defendant argued "he did not take until after the killing," and then only to hide it.[7]

The court of appeals affirmed, rejecting the defendant's contention.[8] Although the felony-murder rule does not apply "if the intent to steal the victim's property was not formed until after the homicide,"[9] the court explained, "a murder committed during the unbroken chain of events surrounding the predicate felony is committed 'in the perpetration of that felony.'"[10] The court of appeals noted that the murder and the felony do not have to occur at the same time.[11] A "defendant need only have intended to commit the [underlying] felony" at the time of the murder.[12] The court found sufficient evidence for a jury to conclude that the defendant intended to commit larceny of the gun at the time he committed the murder.[13] The court's written opinion, however, did not discuss that evidence.[14] Rather, the court went on to raise an issue not brought up by either party in their respective appeals.[15] The court found that defendant could not be convicted of both first-degree premeditated murder and first-degree felony-murder arising from the death of a single victim.[16] Such a conviction violates double jeopardy, the court found.[17] However, the defendant can be convicted of a single count of murder based on two alternative theories, and the conviction can be corrected to reflect this change.[18]

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5. People v. Orlewicz, 293 Mich. App. 96, 99; 809 N.W.2d 194 (2011), *appeal denied*, 493 Mich. 916; 823 N.W.2d 428 (2012) (citing MICH. COMP. LAWS ANN. § 750.160 (West 2012)).

6. *Id.* at 111.

7. *Id.*

8. *Id.* at 111-12.

9. *Id.* at 111 (citing People v. Brannon, 194 Mich. App. 121, 125; 486 N.W.2d 83 (1992)).

10. *Id.* (quoting People v. Gillis, 474 Mich. 105, 121; 712 N.W.2d 419 (2006)).

11. *Orlewicz*, 293 Mich. App. at 111.

12. *Id.* (citing *Brannon*, 194 Mich. App. at 125).

13. *Id.*

14. *Id.* at 111-12 (stating that the "evidence was sufficient to support defendant's felony-murder conviction.").

15. *See id.* at 112 (ruling that it is a violation of double jeopardy for a defendant to be convicted of both first-degree premeditated murder and first-degree murder, when both convictions pertain to the death of the same person).

16. *Id.* at 112.

17. *Orlewicz*, 293 Mich. App. at 112.

18. *Id.*

B. Felony Murder with Vulnerable Adult Abuse

In *People v. Comella*, the defendant was convicted of first-degree felony murder.[19] The underlying felony was vulnerable-adult abuse.[20] The defendant's wife died of blunt force trauma to the head.[21] Prior to her death, she needed medical attention for numerous injuries and broken bones.[22] Her daughters contacted Adult Protective Services, but while an investigation was pending, the victim died.[23]

The issue on appeal was "whether, under the felony-murder statute . . . the prosecution must prove that a defendant committed both first- and second-degree vulnerable-adult abuse."[24] The court of appeals affirmed the defendant's conviction,[25] and held that the "prosecution must only show either offense," but not both.[26] The felony-murder statute[27] defines felony murder, in part, as "murder committed in the perpetration of . . . vulnerable adult abuse in the first *and* second degree," instead of using the disjunctive "or."[28] The court concluded that the legislature did not intend the literal meaning of the word "and," which would render the statute "dubious."[29] A person cannot commit both first- and second-degree vulnerable-adult abuse at the same time, the court noted, because "[o]ne cannot act with both intent and recklessness," which each statute requires, respectively.[30] Accordingly, the court concluded, the elements of felony-murder are met by commission of either first- or second-degree vulnerable-adult abuse.[31]

19. People v. Comella, 646 Mich. App. 643, 646; 823 N.W.2d 138 (2012).
20. *Id.* at 647.
21. *Id.* at 646.
22. *Id.* at 645-46.
23. *Id.* at 646.
24. *Id.* at 645.
25. *Comella*, 296 Mich. App. at 647.
26. *Id.* at 645, 651.
27. MICH. COMP. LAWS ANN. § 750.316(b) (West 2012).
28. *Comella*, 296 Mich. App. at 647 (emphasis added) (quoting MICH. COMP. LAWS ANN. § 750.316(b)).
29. *Id.* at 649.
30. *Id.* at 650.
31. *Id.*

III. ASSAULTIVE OFFENSES

A. Assault

In *People v. Meissner*, a jury convicted the defendant of domestic violence, first-degree home invasion, and obstruction of justice. [32] The charges stemmed from an argument between the defendant and his girlfriend.[33] On appeal, the defendant challenged the sufficiency of the evidence.[34]

The court of appeals affirmed.[35] Defendant argued that there was insufficient evidence of an assault, which was an essential element in the domestic violence and home invasion charges.[36] In Michigan, assault is defined as "either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery."[37] A battery is defined as "an intentional, unconsented and harmful or offensive touching of the person of another . . . ."[38] The court found sufficient evidence of an assault.[39] The record indicated that the defendant threw coins at his girlfriend and pushed her.[40] These acts, the court concluded, were "an offensive touching," and a reasonable jury could find an assault with that evidence.[41]

B. Assaulting / Resisting / Obstructing a Police Officer

In *People v. Moreno*, the police were looking for an individual who had several outstanding warrants.[42] The individual's car was parked near the defendant's house.[43] The officers knocked on the door of the house, and when someone answered the door, an officer stated that he wanted to "identify who was inside the house."[44] The officers were told the person

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32. People v. Meissner, 294 Mich. App. 438, 442; 812 N.W.2d 37 (2011).
33. *Id.* at 442-44.
34. *Id.* at 444-45.
35. *Id.* at 455.
36. *Id.* at 453-54.
37. *Id.* at 454 (quoting People v. Starks, 473 Mich. 227, 234; 701 N.W.2d 136 (2005)).
38. *Meissner*, 294 Mich. App. at 454 (quoting People v. Reeves, 458 Mich. 236, 240 n.4; 580 N.W.2d 433 (1998)).
39. *Id.*
40. *Id.*
41. *Id.*
42. People v. Moreno, 491 Mich. 38, 42; 814 N.W.2d 624 (2012).
43. *Id.*
44. *Id.*

they were looking for was not inside the house.[45] When the officers tried to enter the home anyway, to "secure it," while waiting for a warrant, the defendant came to the door and demanded they obtain a warrant before entering his house.[46] The defendant tried to close the door, but one of the officers put his shoulder against it, and a struggle ensued in which the officer was injured.[47] The defendant was charged with assaulting, resisting, or obstructing a police officer,[48] and assaulting, resisting, or obstructing a police officer, causing injury.[49] He moved to dismiss the charges, arguing the officers unlawfully tried to enter his house.[50] The trial court agreed, finding no exigent circumstances that would have abrogated the warrant requirement.[51] However, the trial court found that a "lawful" action by a police officer is not a requirement of the statute that the defendant was charged with violating, and therefore, the charges should not be dismissed.[52] The defendant appealed.[53]

The court of appeals affirmed the trial court in an unpublished decision.[54] The court cited *People v. Ventura*, which held that the legislature chose to modify the traditional common law rule that a person may resist an unlawful arrest.[55] In doing so, the appellate court extended the holding in *Ventura* to the context of illegal entries of the home.[56] Thus, the court of appeals found the officer's forcible entry into the defendant's house did not have to be lawful for the defendant to be charged with assaulting or resisting the officer.[57] Defendant appealed.[58]

The Michigan Supreme Court reversed the judgment of the court of appeals.[59] The court framed the issue as "whether a person present in his or her own home can resist a police officer who unlawfully and forcibly enters the home" or whether the current resisting arrest statute "prohibits resisting unlawful actions by a police officer."[60] In Michigan, obstructing

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45. *Id.*
46. *Id.* at 42-43.
47. *Id.* at 43.
48. *Moreno*, 491 Mich. at 43 (citing MICH. COMP. LAWS ANN. § 750.81d(1) (West 2012)).
49. *Id.* (citing MICH. COMP. LAWS ANN. § 750.81d(2)).
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Moreno*, 491 Mich. at 43.
55. *Id.* at 41 (citing People v. Ventura, 262 Mich. App. 370; 686 N.W.2d 748 (2004)).
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 58.
60. *Moreno*, 491 Mich. at 44.

a police officer was a common-law crime until the current version of the resisting arrest statute was enacted in 2002.[61] The common law right to resist an unlawful arrest provides that "one may use such reasonable force as is necessary to prevent an illegal attachment and to resist an illegal arrest."[62] The court noted that the prior version of the resisting arrest statute included a reference to the lawfulness of the officer's actions.[63] The court of appeals relied on the fact that the legislature omitted this reference in the current version of the resisting arrest statute to conclude that the legislature chose to "modify the traditional common law rule that a person may resist an unlawful arrest."[64] The supreme court found the court of appeals' conclusion was incorrect, and stated that *Ventura* was wrongly decided.[65] The court noted that one may not assume that the legislature intended to abrogate the common law right to resist an unlawful arrest, when the legislature enacted the current resisting arrest statute, which is silent on the issue of the lawfulness of an officer's actions.[66] "Such an interpretation of the statute would be inconsistent with this Court's rules of statutory construction when abrogation of the common law is at issue."[67] Therefore, consistent with the common law rule regarding resisting arrest, the court noted that the prosecution must establish that the officers' actions were lawful.[68] As the trial court already ruled that the officers' actions were unlawful, the court explained that the charges against the defendant were to be dismissed, as that was the only common law inquiry remaining.[69]

In a separate dissent, in which Justice Young concurred, Justice Markman wrote that the majority should not have reversed the judgment of the court of appeals, overruling *Ventura*.[70] He believed that the Michigan Legislature purposefully excluded the "lawful act" requirement in amending the statutes, which made resisting a police officer unlawful.[71] Thus, there was no statutory support for defendant's position that he had a right to physically resist the police officers who attempted

61. *Id.* at 52-53.

62. *Id.* (quoting People v. Krum, 374 Mich. 356, 361; 132 N.W.2d 69 (1965)).

63. *Id.* at 47 (citing People v. Ventura, 262 Mich. App. 370; 686 N.W.2d 748 (2004)). *See also* MICH. COMP. LAWS ANN. § 750.479 (West 2012).

64. *Moreno*, 491 Mich. at 47-48 (referring to People v. Moreno, No.294840, 2010 WL 2332381 (Mich. Ct. App. June 10, 2010), *overruled by Moreno*, 491 Mich. at 38).

65. *Id.* at 48.

66. *Id.* at 51.

67. *Id.*

68. *Id.* 51-52.

69. *Id.* at 58.

70. *Moreno*, 491 Mich. at 58 (Markman, J., dissenting).

71. *Id.* at 59.

to enter his home.[72] In addition, Justice Markman wrote, there is no support for the proposition that a person has a constitutional right to physically resist a police officer engaging in unlawful conduct.[73] Accordingly, he would have found that the defendant had been properly charged with resisting and obstructing a police officer.[74]

C. Assault with Intent to Do Great Bodily Harm / Felonious Assault

In *People v. Strickland*, the defendant was convicted of breaking into the home of an elderly, married couple and assaulting the husband.[75] The husband had armed himself with a gun, and the defendant attempted to take it away from him.[76] The gun went off three times, and the homeowner was shot in the hand.[77] The defendant was charged with first-degree home invasion,[78] assault with intent to do great bodily harm less than murder,[79] felon in possession of a firearm,[80] felonious assault,[81] and possession of a firearm during the commission of a felony.[82] He was sentenced as a fourth-degree habitual offender to 320 months to sixty years in prison for the first-degree home invasion, concurrent to the sentences for the other offenses.[83] On appeal, he argued that he never possessed the homeowner's gun and therefore, the evidence was insufficient to convict him of assault with intent to do great bodily harm less than murder, felonious assault, felon in possession, and felony firearm.[84]

The court of appeals affirmed, rejecting defendant's argument.[85] First, the court noted that defendant's conviction for assault with intent to do great bodily harm less than murder did not turn upon whether he

72. *Id.* at 67.

73. *Id.* at 78.

74. *Id.* at 80.

75. People v. Strickland, 293 Mich. App. 393, 395-96; 810 N.W.2d 660 (2011), *appeal denied*, 490 Mich. 1002; 807 N.W.2d 321 (2012).

76. *Id.* at 396.

77. *Id.*

78. *Id.* at 395 (citing MICH. COMP. LAWS ANN. § 750.110a(2) (West 2012)).

79. *Id.* at 395-96 (citing MICH. COMP. LAWS ANN. § 750.84 (West 2012)).

80. *Id.* at 392 (citing MICH. COMP. LAWS ANN. § 750.224f (West 2012)).

81. *Strickland*, 293 Mich. App. at 396 (citing MICH. COMP. LAWS ANN. § 750.82 (West 2012)).

82. *Id.* at 396 (citing MICH. COMP. LAWS ANN. § 750.227b (West 2012)).

83. *Id.* at 396. The defendant was sentenced to two to twenty years for the assault with intent to do great bodily harm conviction, two to five years for the felon in possession conviction, and two to fifteen years for the felonious assault conviction, consecutive to a two-year term for the felony-firearm conviction. *Id.*

84. *Id.* at 399.

85. *Id.* at 401.

possessed a firearm.[86] In fact, the court pointed out, possession of a firearm is not a necessary element of that offense.[87] Viewing the evidence in a light most favorable to the government,[88] the court concluded the jury could find that the defendant assaulted the homeowner with the intent to do great bodily harm, when he repeatedly hit the victim in the head and face, and struggled over possession of the gun.[89]

With respect to possession of the gun, the court noted that "the essential question is one of control."[90] The homeowner testified that the defendant immediately attacked him and tried to take away his gun.[91] The defendant had both hands on the gun and was able to take it from the homeowner, when it discharged and shot him in the hand.[92] The court concluded that the defendant possessed the gun jointly with the homeowner during the assault, and therefore, there was sufficient evidence to convict him of the gun charges.[93]

D. Larceny from the Person

In *People v. Smith-Anthony*, the defendant took a bottle of perfume from a department store and put it in her shopping bag without paying for it.[94] A security guard spotted her on the store cameras and proceeded to the floor of the store to follow her.[95] As the defendant was leaving the store, the security guard tried to stop her, and the defendant fought back.[96] The defendant was caught and charged with unarmed robbery,[97] second degree retail fraud,[98] possession of marijuana[99] and larceny from the person.[100] On the day of trial, the prosecutor dismissed the marijuana

86. *Id.* at 399-400.

87. *Strickland*, 293 Mich. App. at 399-400.

88. *Id.* at 399 (quoting People v. Wolfe, 440 Mich. 508, 515; 489 N.W.2d 748 (1992)).

89. *Id.* at 400.

90. *Id.* (citing People v. Hill, 433 Mich. 464, 470-71; 446 N.W.2d 140 (1989), and People v. Konrad, 449 Mich. 263, 271; 536 N.W.2d 517 (1995)).

91. *Id.*

92. *Id.*

93. *Strickland*, 293 Mich. App. at 401.

94. People v. Smith-Anthony, 296 Mich. App. 413, 414; 821 N.W.2d 172 (2012), *appeal granted*, 493 Mich. 879; 821 N.W.2d 787 (2012).

95. *Id.* at 415.

96. *Id.* at 415-16.

97. *Id.* at 416 (citing MICH. COMP. LAWS ANN. § 750.530 (West 2012)).

98. *Id.* (citing MICH. COMP. LAWS ANN. § 750.356d (West 2012)).

99. *Id.* (citing MICH. COMP. LAWS ANN. § 333.7403(2)(d) (West 2012)).

100. *Smith-Anthony*, 296 Mich. App. at 416 (citing MICH. COMP. LAWS ANN. § 750.357 (West 2012)).

and retail fraud charges,[101] but a jury convicted her of larceny from the person.[102] She was sentenced to four to twenty years in prison.[103] She appealed, arguing the prosecution presented no evidence she stole anything from "the person of another" as required by the larceny statute.[104]

The court of appeals reversed.[105] The larceny from a person statute provides:

> Any person who shall commit the offense of larceny by stealing from the person of another shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years.[106]

The court noted that in order to prove larceny from the person, the prosecution must show "(1) the taking of someone else's property without consent, (2) movement of the property, (3) with the intent to steal or permanently deprive the owner of the property, and (4) [that] the property was taken from the person or from the person's immediate area of control or immediate presence."[107] The court emphasized that simple larceny differs from larceny from the person, because larceny from the person "creates a substantial risk of physical harm to another."[108] The prohibition against larceny from the person is meant to protect the person from an "invasion" of his or her "immediate presence" by a thief, although the court pointed out that indirect contact with the victim may also be a violation of the statute.[109]

In the present case, the court found that no evidence had been presented that the defendant committed a larceny from the person of the security guard when she took the perfume.[110] The security guard never

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101. *Id.* The court of appeals theorized that the government dismissed the second degree retail fraud charge because the statute requires the item be priced between $200 and $1000. *Id.* at 416 n.1. The price of the perfume taken by the defendant was $58. *Id.* at 414.

102. *Id.* at 416.

103. *Id.*

104. *Id.*

105. *Id.* at 414.

106. *Smith-Anthony*, 296 Mich. App. at 417 (citing MICH. COMP. LAWS ANN. § 750.357).

107. *Id.* (quoting People v. Perkins, 262 Mich. App. 267, 271-72; 686 N.W.2d 237 (2004)).

108. *Id.* at 417 (quoting United States v. Payne, 163 F.3d 371, 375 (6th Cir. 1998)).

109. *Id.* at 418 (citing People v. Gould, 384 Mich. 71, 80; 179 N.W.2d 617 (1970), and *Perkins*, 262 Mich. App. at 272).

110. *Id.*

possessed the perfume, nor was it ever under her control.[111] The security guard was not within the defendant's "immediate presence" when the defendant put the perfume into her shopping bag, the court concluded.[112] The court rejected the notion that the victim and perpetrator need only be in sight or hearing range of each other for a larceny from the person to occur.[113] The court pointed out that defendant's conduct was not lawful, but rather fit more under the third-degree retail fraud statute.[114] In addition, her physical confrontation with the security guard was within the unarmed robbery statute, but the jury acquitted her of that charge.[115]

IV. CRIMINAL SEXUAL CONDUCT

A. Relation to Victim

In *People v. Zajaczkowski*, the defendant pled guilty to first-degree criminal sexual conduct[116] after having sex with his younger step-sister.[117] The defendant plead guilty on condition that he could appeal whether he may only be found guilty of third-degree criminal sexual conduct, which would apply if he were unrelated to the victim.[118] The evidence showed that the defendant was born during his parent's marriage, and they subsequently divorced.[119] In the divorce judgment, the defendant was referred to as "the minor child of the parties."[120] His father had a child with another woman, who was the victim in this case, and who was considered defendant's half-sister.[121] During defendant's preliminary exam, his father testified that he was unsure of whether he was actually defendant's biological father, although he considered him a son.[122] Genetic testing indicated the defendant was biologically unrelated to his father.[123] The defendant thereafter argued that he was not related

111. *Id.*
112. *Smith-Anthony*, 296 Mich. App. at 418.
113. *Id.* at 420.
114. *Id.* at 421-22 (citing MICH. COMP. LAWS ANN. § 750.356d(4)(b) (stating that a person who commits a theft of items priced at $200 or less is guilty of third-degree retail fraud)).
115. *Id.*
116. *See* MICH. COMP. LAWS ANN. § 750.520b(1)(b)(ii) (West 2012).
117. People v. Zajaczkowski, 293 Mich. App. 370, 372; 810 N.W.2d 627 (2011), *vacated*, 493 Mich. 6; 825 N.W.2d 554 (2012).
118. *Id.* at 372 (citing MICH. COMP. LAWS ANN. § 750.520d(1)(a) (West 2012)).
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Zajaczkowski*, 293 Mich. App. at 372.

by blood to the victim, and therefore, could not be guilty of first-degree criminal sexual conduct, but rather, only third-degree criminal sexual conduct.[124] The trial court disagreed, and the defendant appealed.[125]

In a case of first impression, the court of appeals affirmed, rejecting the defendant's arguments.[126] One element of first-degree criminal sexual conduct is that the defendant must be related to the victim "by blood or affinity to the fourth degree."[127] Although genetic testing indicated the defendant was not actually related to the victim by blood, the court of appeals found he could be convicted of first-degree criminal sexual conduct because the presumption that he was the legitimate child of his parent's marriage could not be overcome.[128]

The court first examined the definitions of "by blood" and "affinity," as used in the criminal sexual conduct statute.[129] The court found that the phrase "related . . . by blood" means descending from a common ancestor.[130] The term "affinity" is defined as "a relationship by marriage."[131] The court noted that whether the current criminal sexual conduct statute was enacted, degrees of relation were computed by civil law rules, and siblings are related to the second degree, not the fourth degree.[132]

Defendant argued that he was unrelated by blood to the victim, as the genetic testing showed, and any relation by affinity ended with his parents' divorce.[133] However, the court rejected this argument.[134] The divorce judgment did not state that the defendant was not a child of the marriage.[135] Accordingly, the defendant and the victim shared the same legal father.[136] Only the defendant's mother and legal father could rebut the presumption that the defendant was a legitimate child of the marriage, the court wrote.[137] Therefore, the court concluded, as a matter of law, the defendant and the victim were related by blood, sharing the same father, and were related within the second-degree by descent from a

124. *See id.* at 376.
125. *Id.* at 377.
126. *Id.*
127. *Id.* at 373 (citing MICH. COMP. LAWS ANN. § 750.520b(1)(b)(ii)).
128. *Id.* at 380-81.
129. *Zajaczkowski*, 293 Mich. App. 373-74.
130. *Id.* at 374.
131. *Id.* at 374.
132. *Id.* at 375-76.
133. *Id.* at 376.
134. *Id.* at 380.
135. *Zajaczkowski*, 298 Mich. App. at 380.
136. *Id.*
137. *Id.*

common ancestor.[138] Thus, the defendant could be convicted of first-degree criminal sexual conduct.[139]

On December 19, 2012, the Supreme Court of Michigan vacated defendant's first-degree CSC conviction.[140] The court found that the elements of first-degree CSC could not be met because there was no blood relationship between the defendant and the victim.[141] In addition, the court held, "the presumption of legitimacy cannot be substituted for a blood relationship in order to establish this element of the crime charged."[142] The court remanded the case to the trial court for entry of conviction of third-degree CSC under the plea agreement the defendant entered into earlier in the case.[143]

B. Involving Another Felony

In *People v. Lockett*, the defendants were convicted of first-degree criminal sexual conduct[144] involving the felony of disseminating sexually explicit material to a minor.[145] The statute at issue states:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> * * *
>
> (c) Sexual penetration occurs under circumstances involving the commission of any other felony.[146]

The defendants challenged their convictions, arguing there was no connection between the "other felony" and the "sexual penetration."[147] The court previously held, in *People v. Waltonen*, that there must be a sufficient nexus between the "other felony" and the "sexual

138. *Id.* at 380.
139. *See id.* at 380-81.
140. People v. Zajaczkowski, 493 Mich. 6; 825 N.W.2d 554 (2012).
141. *Id.* at 14-15.
142. *Id.*
143. *Id.*
144. *See* MICH. COMP. LAWS ANN. § 750.520b(1)(c) (West 2012).
145. People v. Lockett, 295 Mich. App. 165, 179; 814 N.W2d 295 (2012), *appeal denied*, 493 Mich. 852; 820 N.W.2d 506 (2012).
146. *Id.*
147. *Id.* at 174.

penetration.[148] In *Waltonen*, the court found the other felony was directly related to the sexual penetration when the defendant demanded sex in exchange for providing Oxycontin.[149]

In the present case, the trial court found the other felony occurred when the defendants engaged in sexual penetration with a woman in plain view of a minor.[150] The defendants argued, however, that the statute is arbitrary when the victim of the other felony is different from the "victim" of the sexual penetration.[151]

The court of appeals agreed with the defendants' argument, finding the statute "unconstitutionally invites arbitrary and abusive enforcement when it is applied to situations where, as here, engage in consensual, legal sexual penetration is elevated to CSC-1 solely because a minor was present and the "victim" of the penetration was not impacted by the additional felony."[152] Therefore, the court reversed the defendants' convictions for CSC-1.[153]

V. OFFENSES AGAINST PROPERTY

A. Armed Robbery

In *People v. Williams*, the defendant pled guilty to armed robbery after he entered a gas station and fled with $160 in cash.[154] The next day, he entered a tobacco shop but fled with nothing.[155] He was arrested the same day.[156] He pled no contest to a second armed robbery count for the incident at the tobacco shop.[157] He was sentenced to concurrent prison terms of twenty-four to forty years for the two robberies.[158] He then moved to withdraw his plea, arguing that there was no sufficient factual basis to support the convictions.[159] Specifically, he argued that because he had not taken anything from the tobacco shop, he could not be found guilty of armed robbery.[160] The trial court denied the motion, finding the

148. *Id.* at 175 (citing People v. Waltonen, 272 Mich. App. 678, 691-93; 728 N.W.2d 881 (2006)).
149. *Id.* (citing *Waltonen*, 272 Mich. App. at 682).
150. *Id.* at 175.
151. *Lockett*, 295 Mich. App. at 175-76.
152. *Id.* at 177, 179.
153. *Lockett*, 295 Mich. App. at 180.
154. People v. Williams, 491 Mich. 164, 166-67; 814 N.W.2d 270 (2012).
155. *Id.* at 167.
156. *Id.*
157. *Id.*
158. *Id.* at 168.
159. *Id.*
160. *Williams*, 491 Mich. at 168.

language of the armed robbery statute,[161] as amended in 2004, allowed for a conviction based on an attempted larceny.[162]

The court of appeals affirmed, noting that robbery and armed robbery now encompass attempts following the 2004 amendment of the statute.[163] The defendant appealed, and the Michigan Supreme Court granted leave to address "whether a larceny needs to be completed before a defendant may be convicted of armed robbery."[164]

The Michigan Supreme Court affirmed.[165] The court noted that, at common law, the crime of robbery was defined as "the felonious taking of money or goods of value from the person of another or in his presence, against his will, by violence or putting him in fear."[166] Common law robbery required a completed larceny; a "taking from the person."[167] Armed robbery required the same evidence, but with the additional element that the perpetrator had a dangerous weapon.[168]

The court cited *People v. Randolph*,[169] a case in which the court of appeals examined the scope of the robbery statute and whether it had a "transactional approach" to robbery.[170] Under a "transactional approach," the court wrote, "a defendant has not completed a robbery until he has escaped with stolen [property]. Thus, a completed larceny may be elevated to a robbery if the defendant uses force after the taking and before reaching temporary safety."[171] After the *Randolph* decision, the Michigan Legislature amended the robbery statutes to include a taking that occurs "in the course of committing a larceny."[172] That phrase is defined as "acts that occur in an attempt to commit the larceny or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property."[173]

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161. *See* MICH. COMP. LAWS ANN. § 750.529 (West 2012).

162. *Williams*, 491 Mich. at 168.

163. *Id.*

164. *Id.* at 169 (citing People v. Williams, 489 Mich. 856, 856; 795 N.W.2d 15 (2011)).

165. *Id.* at 184.

166. *Id.* at 169 (quoting People v. Covelesky, 217 Mich. 90, 96; 185 N.W. 770 (1921) (internal quotation marks omitted)).

167. *Id.*

168. *Williams*, 491 Mich. at 169 (citing People v. Calvin, 60 Mich. 113, 119; 26 N.W. 851 (1886)).

169. 466 Mich. 532, 535-36; 648 N.W.2d 164 (2002).

170. *Williams*, 491 Mich. at 170-71.

171. *Id.* at 170 (citing *Randolph*, 466 Mich. at 535).

172. MICH. COMP. LAWS ANN. § 750.530 (West 2004) (amending MICH. COMP. LAWS ANN. § 750.530 (1931)).

173. MICH. COMP. LAWS ANN. § 750.530(2).

In the present case, the Michigan Supreme Court framed the issue as "whether the legislature intended to remove the element of a completed larceny from the crime of robbery when it amended the statutes in 2004."[174] The court held that there was a "clear intent" to remove a completed larceny, which was a departure from the common law definition of robbery.[175] Instead, the legislature broadened the scope of the robbery statute to include a "course of conduct" theory of robbery, which includes "an attempt to commit a larceny."[176] Thus, the court concluded, an attempted robbery or attempted armed robbery with an incomplete larceny is sufficient for a conviction under the amended robbery or armed robbery statutes.[177]

In a separate dissent, Justice Kelly disagreed with the majority's conclusion that a completed larceny is not necessary to sustain a conviction for armed robbery.[178] The 2004 revisions to the robbery statutes were intended to punish any completed larceny that included force as a robbery, she wrote.[179] Thus, robbery still requires a completed larceny.[180] Moreover, she explained that the majority's decision did away with the distinction between armed robbery and assault with intent to rob while armed.[181] The statute requires a completed larceny for armed robbery, not merely an intended one.[182] She would have found the trial court abused its discretion denying defendant's motion to withdraw his plea, since there was an inadequate factual basis to support a finding that defendant committed an armed robbery.[183] She concluded that no evidence proved that the defendant committed a larceny at the tobacco store, and therefore she would reverse the court of appeals and remand the case to the trial court.[184]

B. Breaking and Entering a Vehicle Causing Damage

In *People v. Kloosterman*, the defendant appealed his conviction for breaking and entering a vehicle causing damage.[185] The evidence showed

174. *Williams*, 491 Mich. at 171.
175. *Id.* at 172.
176. *Id.* at 184.
177. *Id.*
178. *Id.* at 184 (Kelly, J., dissenting).
179. *Id.* at 193
180. *Williams*, 491 Mich. at 193 (Kelly, J., dissenting).
181. *Id.* at 194.
182. *Id.* at 195.
183. *Id.* at 198.
184. *Id.* at 199.
185. People v. Kloosterman, 295 Mich. App. 68, 69; 810 N.W.2d 917 (2011) (citing MICH. COMP. LAWS ANN. § 750.356a(3) (West 2012)).

that he broke into the victim's trailer by cutting the padlock, which was part of the trailer.[186] He argued that the prosecution had not proven the damage element of the statute, and that the padlock was not "any part" of the trailer.[187]

The court of appeals rejected defendant's argument and affirmed his conviction.[188] Examining the statute, the court found the phrase "[a]ny part of . . . [a] trailer" as used in the statute "covers all portions of the trailer in whatever degree, or whatever separate or distinct pieces of the trailer that were broken, torn, cut, or otherwise damaged."[189] As the padlocks were purchased with the trailer, to be used on the trailer, and served the trailer's function of locking it and securing the items contained within it, they were part of the trailer within the meaning of the statute, and defendant's conviction must stand.[190]

VI. OTHER OFFENSES

A. Accosting or Enticing a Minor for Immoral Purposes

In *People v. Kowalski*, the defendant, age fifty-one, began chatting on the internet with a supposedly fifteen year old girl, who was really an undercover police officer.[191] In the chats, the defendant tried to convince the "girl" to call him or come to his house because he had a pool where "lots of partying" occurred.[192] After six days of chatting, the police officer came to defendant's house to execute a search warrant.[193] Defendant denied owning a computer, but after the officer left, a neighbor reported to police that he saw the defendant dump "thin strips of beige plastic" on the side of a road.[194] The defendant was charged with accosting a minor for immoral purposes or encouraging a minor to commit an immoral act[195] and using a computer or the internet to accomplish the same.[196]

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186. *Id.* at 70.
187. *Id.* at 69.
188. *Id.* at 70-71.
189. *Id.* at 70.
190. *Id.*
191. People v. Kowalski, 489 Mich. 488, 491; 803 N.W.2d 200 (2011), *reh'g denied*, 490 Mich. 868; 802 N.W.2d 608 (2011).
192. *Id.* at 492-93.
193. *Id.* at 494.
194. *Id.*
195. *See* MICH. COMP. LAWS ANN. § 750.145a (West 2012).
196. *Kowalski*, 489 Mich. at 496 (citing MICH. COMP. LAWS ANN. § 750.145d (West 2012)).

At trial, a witness for the prosecution testified that when she was twenty-two years old, she began an online relationship with the defendant that became sexual.[197] She testified that the defendant asked her to wear clothes that made her look young, and that she should bring her younger sister to his house to clean the pool.[198] She further testified that the defendant showed her pictures on his computer of very young girls.[199] The trial court admitted her testimony under Michigan Rule of Evidence 404(b) to show defendant's behavior evidenced a common scheme or plan.[200] Defense counsel did not present any evidence during the trial, but moved for a directed verdict.[201] The trial court denied the motion.[202] While the court was instructing the jury on the elements of the crime of accosting a minor, it stated:

> The Defendant is charged with accosting a child for immoral purposes. To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the Defendant believed he was engaging with a child under the age of 16 years. Second, that the Defendant has then the intent to induce that person who he believed to be under 16 years to commit an immoral act or an act of sexual intercourse or an act of gross indecency or other acts of depravity or delinquency or did encourage said person to engage in one of those acts.[203]

Defense counsel did not object to the instructions.[204] While deliberating, the jury asked for the definition of "accost," to which the court responded "to approach and speak to, greet first before being greeted, especially in an intrusive way."[205] Defense counsel also did not object to this definition.[206] The jury returned a guilty verdict to accosting a minor and using a computer or the internet to do the same, and the defendant appealed.[207]

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197. *Id.* at 494.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.* at 495.
202. *Kowalski*, 489 Mich. at 495
203. *Id.* at 495-96.
204. *Id.* at 496.
205. *Id.* at 496, 803 N.W.2d at 207.
206. *Id.*
207. *Id.*

The court of appeals reversed and remanded for a new trial.[208] The court concluded that the trial court did not properly instruct the jury because the instruction omitted the *actus reus* of the crime.[209] The prosecution appealed.[210]

The Michigan Supreme Court reversed the court of appeals decision and reinstated the jury verdicts against the defendant.[211] In so doing, the court held that the instructions did not result in reversible error because the evidence was overwhelming and uncontroverted.[212] The court first examined the elements of the offense, and noted that there are two ways to commit the crime of accosting a minor.[213] Under the statute, the prosecution must prove a defendant: (1) accosted, enticed, or solicited (2) a child (or a person the defendant believes to be a child) (3) with intent to induce or force the child to commit (4) a prohibited act.[214] In addition, the statute can be violated if a defendant (1) encouraged (2) a child (or a person the defendant believes to be a child) (3) to commit (4) a prohibited act.[215] The court noted that the statute allows for conviction under two alternative theories—one that pertains to certain acts and requires a specific intent, and another that pertains to encouragement only and does not address intent.[216] If a defendant has accosted, enticed or solicited, the statute requires a showing of the specific intent to induce or force the child to commit the prohibited acts.[217] On the other hand, the "encouragement" prong of the statute, the court reasoned, signaled an intention by the legislature that the *mens rea* element "be the intent to do the physical act of encouraging."[218] As such, the act of encouragement is the crime, the court noted, and a defendant by doing that act is "presumed to intend the natural consequences of his actions . . ." which is consistent with a general intent crime.[219]

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208. *See* People v. Kowalski, No. 288855, 2010 WL 1687760 (Mich. Ct. App. Apr. 27, 2010), *rev'd* 489 Mich. 488; 803 N.W.2d 200 (2011).

209. *Kowalski*, 489 Mich. at 496-97. *Actus reus* is "[t]he wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability[.]" *Id.* at 497 n.4 (citing BLACK'S LAW DICTIONARY (7th ed. 2009)).

210. *Id.* at 497.

211. *Id.* at 510.

212. *Id.* at 509.

213. *Id.* at 499.

214. *Id.*

215. *Kowalski*, 489 Mich. at 499.

216. *Id.*

217. *Id.* at 500.

218. *Id.*

219. *Id.* (quoting People v. Getchell, 6 Mich. 496, 504 (1859)).

The court examined the jury instruction at issue in the case, and concluded that it misinformed the jury of the elements of the offense because it omitted the *actus reus* element of the "accosts, entices, or solicits" prong of the statute.[220] This was a constitutional error, the court wrote, however because defense counsel approved of the instructions, defendant waived the error.[221] However, the court concluded that the error did not affect defendant's substantial rights because the evidence relating to the missing element was "overwhelming and uncontested."[222] The court stated:

> Here, even if the trial court had properly instructed on the accosts, entices, and solicits prong of the offense, the jury would still have convicted defendant because the Internet chats, in and of themselves, were immoral, grossly indecent, delinquent, and depraved acts that constituted the actus reus under either prong of the offense.[223]

The court also noted that the testimony of the twenty-two-year-old girl provided sufficient evidence for a reasonable juror to conclude that defendant's acts were intended to engage the victim in sexually delinquent behavior through a common scheme or plan that he had employed on the witness.[224] The court concluded that the evidence of the *actus reus* under either prong of the statute was "overwhelming and uncontroverted."[225] Because the defendant admitted he chatted on the Internet with a person he thought was fifteen years old, he "cannot establish that the trial court's charge to the jury affected the outcome of the lower court proceedings."[226] Thus, the court found that reversal was not warranted.[227]

B. Controlled Substances Act

In *People v. Hartuniewicz*, the defendant was convicted of possession of ketamine, a schedule three controlled substance in

220. *Id.* at 502.
221. *Kowalski*, 489 Mich. at 503.
222. *Id.* at 506.
223. *Id.* at 506-07.
224. *Id.* at 508.
225. *Id.* at 509.
226. *Id.* at 509-10.
227. *Kowalski*, 489 Mich. at 510.

Michigan and under federal law.[228] He argued on appeal that the prosecution failed to establish that the ketamine was not "in a proportion or concentration to vitiate the potential for abuse."[229] Diluted substances are not included in the Controlled Substances Act.[230] Defendant argued that by excluding diluted substances, the statute places the burden on the prosecutor of proving the substance is not diluted.[231]

The court of appeals affirmed, rejecting the defendant's argument.[232] The Controlled Substances Act places the burden of proving an "exception" on the defendant, the court noted.[233] Such an exception or exclusion must be presented as an affirmative defense.[234] The court analyzed the record and noted that the defendant presented no evidence the ketamine was diluted.[235] Therefore, the conviction must stand.[236]

C. Furnishing a Cellular Telephone to a Prisoner

In *People v. Armisted*, the defendant pled no contest to furnishing a cellular telephone to a prisoner.[237] Before doing so, he challenged every aspect of the statute under which he was charged.[238] First, he argued before the lower court that he had not furnished a cellular telephone to a "prisoner in a correctional facility" within the meaning of the statute.[239] Rather, he contended that the "inmates" at the reentry program facility where the telephone was given, were "parolees" rather than prisoners.[240] The district court dismissed this argument, and the defendant filed a motion with the circuit court on the same issue.[241] However, the parties stipulated that the inmates at the reentry facility are classified by the

228. People v. Hartuniewicz, 294 Mich. App. 237, 238; 816 N.W.2d 442 (2011). Ketamine is a prohibited controlled substance under MICH. COMP. LAWS ANN. § 333.7216(1)(h) (West 2012), and under federal law at 21 C.F.R. § 1308.13(c)(7) (West 2012). *Id.* at 238 n.1.

229. *Id.* at 238.

230. *Id.* at 238-39 (citing MICH. COMP. LAWS ANN. § 333.7227(1) (West 2012)).

231. *Id.* at 240.

232. *Id.* at 244.

233. *Id.*

234. *Hartuniewicz*, 294 Mich. App. at 246 (finding that the burden of proving possession in other statutes is an exception to the CSA, not an element).

235. *Id.* at 246-47.

236. *Id.* at 249-50.

237. People v. Armisted, 295 Mich. App. 32, 35; 811 N.W.2d 47 (2011) (citing MICH. COMP. LAWS ANN. § 800.283a (West 2012)).

238. *Id.* at 35-37.

239. *Id.* at 36-37.

240. *Id.* at 35.

241. *Id.* at 35-36.

Michigan Department of Corrections as parolees.[242] The defendant renewed his argument, and further stated that the facility was a "community relations program," not a correctional facility.[243] The circuit court held that the facility inmates are "prisoners" within the meaning of the statute, and the defendant entered a no-contest plea.[244] He was sentenced as habitual offender to one to ten years and appealed.[245]

The court of appeals affirmed.[246] The statute at issue provides:

> A person shall not sell, give, or furnish, or aid in the selling, giving, or furnishing of, a cellular telephone or other wireless communication device to a prisoner in a correctional facility, or dispose of a cellular telephone or other wireless communication device in or on the grounds of a correctional facility.[247]

The term "prisoner" as used in the statute includes all parolees who have not yet been released, and inmates at the facility are prisoners because they have not been fully released.[248] The legislature excluded only those persons who have been "released on parole."[249] The phrase "released on parole," the court found, does not refer to a prisoner's release to an intermediate facility such as the one at issue in this case.[250]

The court also found that the reentry facility is a "correctional facility" within the statute.[251] A "state prison" is any facility operated by the Department of Corrections, the court wrote, to confine or restrain those committed to its jurisdiction.[252] The important consideration is the purpose of the facility, not its name.[253] The fact that those confined at a reentry facility are parolees does not mean it is not a secure facility.[254] Thus, the court concluded, there was sufficient evidence to establish the defendant provided a cellular telephone to a prisoner in violation of the statute prohibiting such conduct.[255]

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242. *Id.* at 36.
243. *Armisted*, 295 Mich. App. at 36.
244. *Id.*
245. *Id.* at 35.
246. *Id.*
247. *Id.* at 38 (citing MICH. COMP. LAWS ANN. § 800.283a).
248. *Id.* at 39-41.
249. *Armisted*, 295 Mich. App. at 39-41.
250. *Id.*
251. *Id.* at 42-44.
252. *Id.* at 43.
253. *Id.* at 43-44.
254. *Id.* at 44.
255. *Armisted*, 295 Mich. App. at 45.

D. Obstruction of Justice

In *People v. Meissner*, the defendant was convicted of domestic violence,[256] first degree home invasion[257] and obstruction of justice.[258] The charges stemmed from an argument between the defendant and his girlfriend.[259] On appeal, he challenged the sufficiency of the evidence.[260]

The court of appeals affirmed.[261] The court found sufficient evidence of obstruction of justice.[262] The court noted that obstruction of justice is a common-law charge which "is generally understood as an interference with the orderly administration of justice."[263] An example of obstruction of justice is witness coercion, which involves "an attempt to dissuade a witness from testifying;" such coercion can be accomplished by words alone, the court stated.[264] The court examined the text messages presented as evidence at the trial.[265] At least one of the text messages referred to the police investigation.[266] The defendant sent the messages to his girlfriend after breaking into her apartment and assaulting her.[267] The messages stated he would harm her if she spoke to the police.[268] These messages, therefore, constituted an attempt to interfere with the criminal investigation, the court concluded, and a reasonable jury could find these messages constituted obstruction of justice.[269]

E. Willful Neglect of Duty by Public Officer

In *People v. Waterstone*, the Michigan Attorney General charged a Wayne County circuit court judge with four counts of felony misconduct in office,[270] as a result of the judge's' failure to disclose communications with the prosecutor during a criminal trial and allowing perjured

256. MICH. COMP. LAWS ANN. § 750.81(3) (West 2012).
257. MICH. COMP. LAWS ANN. § 750.110a(2) (West 2012).
258. People v. Meissner, 294 Mich. App. 438, 442; 812 N.W.2d 37 (2011) (citing MICH. COMP. LAWS ANN. § 750.505 (West 2012)).
259. *Id.* at 442-44.
260. *Id.* at 452.
261. *Id.* at 460.
262. *Id.* at 455.
263. *Id.* at 454 (citing People v. Thomas, 438 Mich. 448, 455; 475 N.W.2d 288 (1991)).
264. *Meissner*, 294 Mich. App. at 454.
265. *Id.* at 454-55.
266. *Id.* at 454.
267. *Id.* at 455.
268. *Id.*
269. *Id.*
270. MICH. COMP. LAWS ANN. § 750.505 (West 2012).

testimony to be given in court during a drug trial.[271] There were three *in camera* interviews held between the judge and the prosecutor, in which the prosecutor conveyed she knew a witness had committed perjury, but was trying to protect the identity of the confidential informant.[272] According to the records of the meetings, the judge agreed with the prosecutor's actions.[273] The jury could not reach a verdict and a mistrial was declared.[274] Subsequently, at a hearing, defense counsel indicated that he knew the identity of the confidential informant, and argued the case should be dismissed due to the trial court and prosecutor's misconduct in permitting perjured testimony.[275] The judge and prosecutor disqualified themselves, the case was assigned to a different judge, and the *in camera* interviews were unsealed.[276] The Attorney General also charged the prosecutor and two police officers involved in the concealment and perjury.[277]

The district court bound the defendant judge over on all four counts of misconduct in office, but the circuit court dismissed three of the four charges.[278] The Attorney General appealed the circuit court's order quashing the first three counts.

The court of appeals held that the appropriate statute which the judge should have been charged under was a statute prohibiting willful neglect of duty by a public officer, which is a misdemeanor.[279] The court found that this statute includes conduct such as willful neglect to perform a legal duty which is the type of misconduct set forth in the charges brought by the Attorney General.[280]

As a result the court affirmed in part, which entailed affirming the circuit court's ruling quashing the three charges in the complaint.[281] The court of appeals also reversed in part, which reversed the circuit court's ruling allowing the fourth count to proceed to trial, and remanded.[282]

In a separate dissent, Judge Talbot wrote that the felony statute relative to misconduct in office includes the element of criminal intent,

271. People v. Waterstone, 296 Mich. App. 121, 126; 818 N.W.2d 432 (2012).
272. *Id.* at 128-29.
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. *Waterstone*, 296 Mich. App. at 130.
278. *Id.* at 131.
279. *Id.* at 144 (citing MICH. COMP. LAWS ANN. § 750.478 (West 2012)).
280. *Id.*
281. *Id.* at 144-45.
282. *Id.* at 145.

while the misdemeanor statute does not.[283] Judge Talbot also believed the majority's analysis results in a felony-misdemeanor distinction between malfeasance and nonfeasance for acts that are equally egregious.[284] He would not dismiss the charges without prejudice, and found it in error and unnecessary.[285] Rather, he believed that if the defendant did not violate a legal duty, then charges cannot be brought under either the felony or misdemeanor statute.[286]

VII. THE MICHIGAN MEDICAL MARIHUANA ACT

A. Physician's Statement Requirement

1. Obtaining Physician's Statement after Arrest

In *People v. Kolanek*, the defendant was found to have eight marijuana cigarettes on April 6, 2009, and was charged with possession of marijuana.[287] He asserted an affirmative defense under Section 8 of the Michigan Medical Marihuana Act (MMMA)[288] and moved to dismiss the case on those grounds.[289] At the hearing on the motion to dismiss, the defendant admitted that he had eight marijuana cigarettes, but stated that he used them for relief of pain and nausea caused by Lyme disease.[290] He presented the testimony of his physician, who had been treating him for nine years, and who confirmed the defendant suffered from Lyme disease.[291]

The evidence indicated that the defendant requested the physician's authorization to use marijuana on April 12, 2009, which was six days after the defendant's arrest for possession of marijuana.[292] His physician gave him the authorization on that date.[293]

The district court denied defendant's motion to dismiss, finding the fact the physician had not approved his use of marijuana prior to the

283. *Waterstone*, 296 Mich. App. at 145 (Talbot, J., concurring in part and dissenting in part).

284. *Id.* at 171.

285. *Id.* at 156.

286. *Id.*

287. 491 Mich. 382, 390; 817 N.W.2d 528 (2012) (citing MICH. COMP. LAWS ANN. § 333.7403(3)(d) (West 2012)).

288. *See* MICH. COMP. LAWS ANN. § 333.26428. *See generally* MICH. COMP. LAWS ANN. §§ 333.26421-.26428 (West 2012).

289. *Kolanek*, 491 Mich. at 390-91.

290. *Id.* at 391.

291. *Id.*

292. *Id.* at 390.

293. *Id.* at 391.

April 6, 2009 arrest, to be dispositive.[294] The court noted the language of the medical marijuana statute is written in past tense, requiring that a physician "has stated" a patient is likely to receive therapeutic treatment from the use of marijuana.[295]

Defendant appealed to the circuit court, which interpreted the statute differently than the district court.[296] Specifically, the circuit court found that a person did not have to obtain a statement from their physician prior to their arrest.[297] Rather, the circuit court held, the statute merely requires that a physician express, at some point, that a patient could benefit from the use of medical marijuana.[298] In the present case, defendant's physician stated this at the motion hearing, which was sufficient.[299] The circuit court reversed the district court's denial of defendant's motion to dismiss, and the prosecution appealed.[300]

The court of appeals, noting this was an issue of first impression, reversed the circuit court and reinstated the charges against the defendant.[301] The court concluded that the physician's statement must have occurred after the enactment of the Michigan Medical Marijuana Act, but prior to a defendant's arrest. [302] The court believed that because the statute is written in the past tense—the physician "has stated" the patient's need for medical marijuana—the intent was that this statement occur prior to an event, such as an arrest or prosecution involving marijuana.[303] The statute was not intended to "afford defendants an after-the-fact exemption for otherwise illegal activities," the court concluded.[304] Furthermore, the court noted,

> [T]he very fact that the law creates the ability to legitimately have a defense to certain actions that would otherwise be illegal would indicate that persons must fulfill those requirements prior to any arrest. Otherwise, there is no incentive for anyone to utilize their time and money to go through the process; everyone would simply engage in the illegal activity, rolling the dice that

294. *Id.*
295. *Kolanek*, 491 Mich. at 391.
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.*
301. People v. Kolanek, 291 Mich. App. 227, 229; 804 N.W.2d 870 (2011), *aff'd in part, rev'd in part*, 491 Mich. 382; 817 N.W.2d 528 (2012).
302. *Id.* at 235.
303. *Id.*
304. *Id.* at 238.

> they will not get caught, with the understanding that, if they do get arrested, they can subsequently receive a retroactive exemption.[305]

Thus, the court held, a physician's statement regarding a patient's benefit from medical marijuana must have occurred prior to arrest, and since that did not occur in the present case, the charges must be reinstated.[306] The court noted, however, that the defendant is not barred from asserting the same defense at trial.[307]

The Michigan Supreme Court affirmed the appellate court's reasoning regarding the physician statement requirement of the MMMA.[308] The court noted that it must have occurred after enactment of the statute, but prior to a defendant's arrest.[309] In fact, the court noted, the MMMA "contemplates that a patient will not start using marijuana for medical purposes until after the physician has provided a statement of approval."[310]

The Michigan Supreme Court did not affirm the appellate court on the final issue.[311] The supreme court held that the defendant is barred from asserting the same defense at trial following the remand of the case.[312] The court believed that no reasonable jury could find Kolanek met the elements of Section 8 of the MMMA regarding the physician's statement, because he did not obtain the statement after enactment of the law but before his arrest.[313] Therefore, he was precluded from using the affirmative defense at trial.[314]

2. Obtaining Physician's Statement after Possessing Marijuana

In *People v. Reed*, the defendant challenged his prosecution for manufacturing marijuana,[315] asserting that he had immunity under the Michigan Medical Marijuana Act (MMMA).[316] While conducting aerial surveillance, the police saw marijuana plants growing at the defendant's

305. *Id.*
306. *Id.* at 241.
307. *Kolanek*, 291 Mich. App. at 241-42.
308. *Kolanek*, 491 Mich. at 408.
309. *Id.*
310. *Id.*
311. *Id.* at 413.
312. *Id.*
313. *Kolanek*, 491 Mich. at 390.
314. *Id.*
315. MICH. COMP. LAWS ANN. § 333.7401(2)(d)(iii).
316. 294 Mich. App. 78, 80; 819 N.W.2d 3 (2011). *See also* MICH. COMP. LAWS ANN. § 333.2624(a) (West 2008).

house.[317] Although the defendant, who suffered from chronic back pain, had inquired about becoming registered to use medical marijuana, he had not done so when the police found the plants.[318] Approximately three weeks later, he received a physician's certification to use medical marijuana, and he received a registry card.[319] Ten days after receiving his card, he was arrested and charged with manufacturing marijuana.[320] He moved to dismiss the charges, arguing he satisfied all of the elements of the affirmative defense under the MMMA, and that he should have been immune from arrest as well.[321] The trial court denied his motion and he appealed.[322]

The court of appeals affirmed,[323] and in doing so, extended its prior ruling in *Kolanek*.[324] The *Reed* court explicitly stated that it was extending the ruling of *Kolanek* to hold that not only does a defendant have to obtain the physician's statement prior to arrest, but he must also obtain the physician's statement prior to commission of the alleged crime.[325] In *Reed*, the pertinent time was prior to the discovery of his marijuana plants by the police.[326]

The court noted that in *Kolanek* police arrested the defendant after finding eight marijuana cigarettes in the defendant's car.[327] Kolanek asserted the MMMA's Section 8 affirmative defense[328] because he used the marijuana to treat pain caused by Lyme disease.[329] Kolanek's doctor authorized the use of marijuana after his arrest, and testified that the amount the defendant had in his possession was reasonable.[330] The *Kolanek* court held, however, that the physician's statement had to be made prior to arrest.[331]

Reed argued that the court of appeals' decision in *Kolanek* applied to his case.[332] According to Reed, *Kolanek* validated his assertion of a

317. *Reed*, 294 Mich. App. at 81.
318. *Id.* at 80-81.
319. *Id.* at 81.
320. *Id.*
321. *Id.*
322. *Id.* at 79.
323. *Reed*, 294 Mich. App. at 79.
324. *See* People v. Kolanek, 291 Mich. App. 227, 241; 804 N.W.2d 870 (2011), *aff'd in part, rev'd in part*, 491 Mich. 382; 817 N.W.2d 528 (2012).
325. *Reed*, 294 Mich. App. at 80.
326. *Id.*
327. *Id.* at 83 (citing *Kolanek*, 291 Mich. App. at 229).
328. MICH. COMP. LAWS ANN. § 333.26428 (West 2008).
329. *Kolanek*, 291 Mich. App. at 231.
330. *Id.* at 230.
331. *Id.* at 241.
332. *Reed*, 294 Mich. App. at 81.

Section 8 affirmative defense, because he had obtained his doctor's approval one month before his arrest.[333] The court disagreed, because in *Kolanek*, the arrest and seizure were simultaneous.[334] Law enforcement discovered that Reed was growing marijuana plants before he obtained his doctor's approval.[335] The *Reed* court pointed out that "[i]t would be absurd if it were possible to assert the § 8 affirmative defense by obtaining a physician's statement after the crime had been committed but before an arrest has been made."[336] Thus, the court concluded that for a Section 8 affirmative defense to apply, the physician's statement must occur before the illegal conduct, i.e., the possession of the marijuana.[337]

The court further found that Reed did not have immunity from arrest or prosecution because he did not have a registry card at the time of the offense, which in this case was when his marijuana plants were discovered by the police.[338] In order for immunity to apply, the qualifying patient has to have been issued and possess a valid registry card prior to possessing the marijuana.[339] The court noted that "much of the same reasoning that applies to the timing under § 8 applies equally to the timing regarding registry identification cards."[340]

B. Definition of "Enclosed, Locked Facility"[341]

In *People v. King*, the defendant was charged with illegally growing marijuana.[342] The charges stemmed from an anonymous tip received by the Michigan State Police, who went to the defendant's house and found marijuana plants growing inside a loosely-covered dog kennel.[343] The officers spoke to the defendant, who had a medical marijuana card, and he unlocked a chain lock on the kennel.[344] The kennel was six feet tall,

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333. *Id.* at 81, 83.

334. *Id.* at 83-84 (citing *Kolanek*, 291 Mich. App. at 229).

335. *Id.* at 80-81.

336. *Id.* at 84 (citing MICH. COMP. LAWS ANN. § 333.26428(a)(1) (West 2008)).

337. *Id.* at 80.

338. *Reed*, 294 Mich. App. at 80 (citing MICH. COMP. LAWS ANN. § 333.26424 (West 2008)).

339. *Id.* at 87 (citing § 333.26424(a)).

340. *Id.*

341. *See* MICH. COMP. LAWS ANN. § 333.26423(c) (West 2008).

342. 291 Mich. App. 503, 504; 804 N.W.2d 911 (2011), *rev'd on other grounds sub nom.* People v. Kolanek, 491 Mich. 382, 399-404; 817 N.W.2d 528 (2012). The Michigan Supreme Court consolidated this case with *People v. Kolanek*, 291 Mich. App. 227; 804 N.W.2d 870 (2011). *See also* MICH. COMP. LAWS ANN. § 333.7401(2)(d)(iii) (West 2012).

343. *King*, 291 Mich. App. at 505-06.

344. *Id.* at 506.

but had an open top and was not secured to the ground.[345] Defendant also had more marijuana plants inside the house in an unlocked living room closet.[346]

King moved to dismiss the charge of manufacturing marijuana based on the affirmative defenses available under the Michigan Medical Marijuana Act (MMMA).[347] The district court denied the motion.[348] In the circuit court, the defendant asserted the same defense, and the court granted the motion.[349] The court found that the defendant met the requirements of a Section 4 defense, because he was a qualifying patient with a valid registry identification card, possessed no more than twelve plants in an enclosed, locked facility, and was otherwise entitled to the presumption that he was engaged in the medical use of marijuana.[350] The prosecutor appealed.[351]

The court of appeals reversed and remanded for reinstatement of the charges.[352] The court reasoned that under the MMMA, a defendant can assert a defense if he complies with the conditions set forth in the Act.[353] Because the court found that defendants must comply with all sections of the MMMA to assert the Section 8 defense, the outcome of this appeal hinged on the MMMA's definition of "enclosed, locked facility," and whether the defendant met the requirements of this definition.[354] The MMMA defines "enclosed, locked facility" as "a closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient.[355]

The court of appeals found the trial court incorrectly interpreted the phrase, "enclosed, locked facility."[356] Under these facts, the appellate court found the defendant failed to comply with the strict requirements of the MMMA to keep the marijuana in an "enclosed, locked facility."[357]

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345. *Id.*

346. *Id.*

347. MICH. COMP. LAWS ANN. § 333.26428 (West 2012).

348. *King*, 291 Mich. App. at 506.

349. *Id.* at 506-07.

350. People v. King, No. 09-8600-FH, 2009 WL 7479547 at pt. II (Mich. Cir. Ct. Sept. 30, 2009) (citing MICH. COMP. LAWS ANN. § 333.26424), *rev'd*, 291 Mich. App. at 505, 511.

351. People v. Kolanek, 491 Mich. 382, 392-93; 817 N.W.2d 528 (2012).

352. *King*, 291 Mich. App. at 504.

353. *Id.* at 509-10.

354. *Id.* at 510-12.

355. MICH. COMP. LAWS ANN. § 333.26423(c) (West 2012).

356. *King*, 291 Mich. App. at 511 (citing § 333.26423(c) and *King*, 2009 WL 7479547 at pt. II).

357. *Id.* at 511-14.

The court held that he was therefore "subject to prosecution under [the law], and the trial court abused its discretion by dismissing the charges."[358]

The Michigan Supreme Court reversed the court of appeals on a threshold statutory interpretation issue without reaching the issue of whether King's installations constituted "enclosed, locked facilit[ies]" under Section 4.[359] The supreme court found that King, who had a valid registry card, could invoke an affirmative defense to the charges without establishing the immunity requirements of Section 4.[360] However, as neither the district court or the circuit court held an evidentiary hearing on the motion to dismiss, the court remanded the case to the circuit court for such a hearing to be held.[361]

C. Asserting the MMMA as an Affirmative Defense

In *People v. Danto*, the court of appeals heard four consolidated, interlocutory appeals addressing various pretrial evidentiary rulings.[362] In two of the cases, the defendants appealed the trial court's order granting the prosecution's motion to prevent them from asserting the Michigan Medical Marihuana Act (MMMA) as an affirmative defense.[363] Danto also appealed the trial court's order denying his motion to dismiss the charges under the MMMA.[364]

The defendants argued the "trial court erred in relying on *People v. King*" as preventing them from asserting a defense under Section 8 of the MMMA.[365] Section 8 provides a defense to a prosecution involving marijuana if: (1) a physician has provided a statement indicating the patient would receive a therapeutic benefit from marijuana for a "serious or debilitating medical condition";[366] (2) the patient and her caregiver collectively possessed an amount of marijuana that was not more than reasonably necessary for the medical condition;[367] and (3) the patient and her caregiver possessed the marijuana to treat the medical condition.[368]

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358. *Id.* at 514.

359. *See* People v. Kolanek, 491 Mich. 382, 403; 817 N.W.2d 528 (2012).

360. *Id.* at 403-04 (citing MICH. COMP. LAWS ANN. §§ 333.26428, .26424 (West 2012)).

361. *Id.* at 414.

362. People v. Danto, 294 Mich. App. 596, 598; 822 N.W.2d 600 (2011).

363. *Id.* (citing MICH. COMP. LAWS ANN. §§ 333.26421-.26430) (West 2012)).

364. *Id.*

365. *Id.* at 605 (citing MICH. COMP. LAWS ANN. § 333.26428).

366. MICH. COMP. LAWS ANN. § 333.26428(a)(1) (West 2012).

367. *Id.* § 333.26428(a)(2).

368. *Id.* § 333.26428(a)(3).

In *People v. King*, the majority held that Section 8 requires a defendant to comply with the strict marijuana growing provisions of Section 4 of the MMMA.[369] In *King*, the defendant had an unlocked closet and a moveable chain link dog kennel, neither of which the court found sufficient as an "enclosed, locked facility" under Section 4.[370]

In *Danto*, the court of appeals affirmed the orders granting the prosecution's motion to preclude the defendants' assertion of the MMMA as an affirmative defense, and denying Danto an evidentiary hearing upon his motion to dismiss.[371] The court examined the preliminary examination testimony, and found it revealed Danto kept the marijuana in various locations throughout the home, not in an enclosed locked facility.[372] The court also noted that under *King*, a necessary requirement for asserting a Section 8 defense is compliance with Section 4's mandate that the marijuana be kept in an enclosed, locked facility.[373] As Danto and his codefendants did not comply with Section 4, the court of appeals concluded that they were precluded from asserting Section 8 as an affirmative defense to the marijuana possession charges.[374]

D. Driving Under the Influence of Marijuana

In *People v. Koon*, the issue was "whether the 'zero tolerance' provision of [motor vehicle law,] which prohibits driving with any amount of a schedule one controlled substance in the driver's body,"[375] "applies if the driver used marijuana under the Michigan Medical Marihuana Act (MMMA)."[376] The court of appeals held that it does apply.[377]

Police pulled over the defendant for speeding.[378] He admitted to having one beer, and volunteered "that he had a medical marijuana registry card and last smoked marijuana five to six hours" before he was pulled over.[379] Police charged him with "operating a motor vehicle with a schedule 1 controlled substance in his body."[380] The district court held

369. 291 Mich. App. at 509-10 (citing MICH. COMP. LAWS ANN. § 333.26424, .26428).
370. *Id.* at 511-14 (citing MICH. COMP. LAWS ANN. § 333.26424).
371. People v. Danto, 294 Mich. App. 596, 613-14; 822 N.W.2d 600 (2011).
372. *Id.*
373. *Id.* at 612-13 (citing MICH. COMP. LAWS ANN. §§ 333.26428, .26424 (West 2012)).
374. *Id.*
375. MICH. COMP. LAWS ANN. § 257.625(8) (West 2010).
376. 296 Mich. App. 223, 225; 818 N.W.2d 473 (2012).
377. *Id.* at 226.
378. *Id.*
379. *Id.*
380. *Id. See* MICH. COMP. LAWS ANN. § 257.625(8).

that the MMMA provided the defendant with immunity from prosecution, unless the prosecutor could prove the marijuana actually impaired the defendant's ability to drive.[381] The circuit court affirmed, and held the MMMA overruled the zero-tolerance law.[382]

The court of appeals disagreed.[383] The court noted that one of the exceptions to the permitted medical use of marijuana in the MMMA states the protections do not apply to operating "a motor vehicle while under the influence of marijuana."[384] Although the MMMA does not define "under the influence,"[385] the motor vehicle code defines it as "any amount of [a] schedule 1 controlled substance, including marijuana, sufficiently influences a person's driving ability to the extent that the person should not be permitted to drive."[386] A person does not have the right to "internally possess" marijuana while driving, the court noted.[387] The MMMA does not bestow a right to use marijuana, the court stated, but rather allows seriously ill individuals to use marijuana for its palliative effects under protection of law.[388] Indeed, the court pointed out that the MMMA does not permit all types of medical marijuana use under all circumstances.[389] There are situations in which it is inappropriate, such as on a school bus, or on public transportation.[390] The court explained that if the drafters of the MMMA wanted to immunize those who use marijuana while driving, they would have explicitly done so.[391] Because the MMMA does not include such immunity, the "defendant was properly charged," the court concluded.[392]

E. Immunity From Prosecution

In *People v. Bylsma*, a search warrant executed at the defendant's apartment yielded eighty-eight marijuana plants.[393] The defendant had

381. *Koon*, 296 Mich. App. at 225 (citing MICH. COMP. LAWS ANN. § 333.26424 (West 2012)).
382. *Id.*
383. *Id.*
384. *Id.* at 230 (citing MICH. COMP. LAWS ANN. § 333.26427(b)(4) (West 2012)).
385. *See* MICH. COMP. LAWS ANN. § 333.26427(b)(4).
386. *Koon*, 296 Mich. App. at 227-28.
387. *Id.* at 230.
388. *Id.* at 229.
389. *Id.* at 230.
390. *Id.* at 228 (citing MICH. COMP. LAWS ANN. § 333.26427 (West 2012)).
391. *Id.* at 230.
392. *Koon*, 296 Mich. App. at 230.
393. 294 Mich. App. 219, 222; 816 N.W.2d 426 (2011), *aff'd in part, rev'd in part on other grounds*, 493 Mich. 17; 825 N.W.2d 543 (2012).

registered as the primary caregiver for two medical marijuana patients.[394] He was charged with manufacturing marijuana,[395] but "moved to dismiss the charge under § 4 of the MMMA,"[396] asserting that "as the registered [primary] caregiver of two qualifying patients, he was allowed to possess 24 marijuana plants."[397] He stated that the rest of the plants "belonged to other primary caregivers and qualifying patients."[398] The other caregivers and patients that had plants growing in the defendant's apartment testified at the evidentiary hearing.[399] However, the court denied the motion to dismiss, finding that the defendant had not complied with the strict requirements of the MMMA.[400] Under the statute, each set of twelve plants allowed for a patient must be designated to meet the medical needs of a specific person, and "be kept in an enclosed, locked facility that can only be accessed by one person."[401] The apartment at issue "was secured by a single lock," and the defendant had access to all of the plants, even the ones for other patients.[402] Thus, the trial court held that the defendant could not invoke the immunity provision of Section 4 of the MMMA.[403]

The court of appeals affirmed.[404] "Section 4 of the MMMA provides immunity from arrest and prosecution to qualifying patients and primary caregivers who have been issued and possess a registry identification card," the court wrote.[405] The MMMA allows a primary caregiver to possess twelve plants for each patient, but a caregiver cannot have more than five patients.[406] At the time of defendant's arrest, he was the "primary caregiver for two qualifying patients."[407] Therefore, he had immunity under the statute as long as "he did not possess more than 24 marijuana plants," the court stated.[408] The court found it clear that the defendant possessed all eighty-eight plants found in his grow operation,

394. *Id.*
395. MICH. COMP. LAWS ANN. § 333.7401(2)(d)(iii) (West 2012).
396. *Bylsma*, 294 Mich. App. at 223 (citing MICH. COMP. LAWS ANN. § 333.26424 (West 2012)).
397. *Id.*
398. *Id.*
399. *Id.* at 224.
400. *Id.* at 225 (citing MICH. COMP. LAWS ANN. § 333.26424 (West 2012)).
401. *Id.* at 225 (quoting the trial court's interpretation of Section 4 of the MMMA).
402. *Bylsma*, 294 Mich. App. at 225.
403. *Id.* at 225-26 (citing MICH. COMP. LAWS ANN. § 333.26424).
404. *Id.* at 236.
405. *Id.* at 228.
406. MICH. COMP. LAWS ANN. § 333.26424(b).
407. *Bylsma*, 294 Mich. App. at 229.
408. *Id.* at 229-30 (citing § 333.26424(b)).

as evidenced by the unfettered access he had to all the plants.[409] The court rejected the defendant's argument that the MMMA allows other registered primary caregivers and qualifying patients "to grow and cultivate marijuana plants" in a common facility.[410] As the defendant was in possession of more than twenty-four plants, the court held he was not entitled to immunity under the MMMA and the charges could not be dismissed.[411]

On December 19, 2012, the Supreme Court of Michigan affirmed, but reversed in part, finding that, although the defendant is not entitled to immunity under Section 4 of the MMMA, he is still entitled to raise a Section 8 defense.[412] However, in order to do so, the defendant has to follow a particular procedure, the court noted, which requires the filing of a motion to dismiss and an evidentiary hearing held before the trial court.[413] The court remanded the case to the trial court for such proceedings.[414]

F. Other Statutory Requirements

In *State v. McQueen*, the defendants owned and operated a medical marijuana dispensary, where registered qualifying patients or their primary caregivers could purchase marijuana that other members of the dispensary stored in lockers that they rented from the dispensary.[415] The prosecuting attorney of Isabella County filed a complaint on behalf of the State of Michigan, seeking injunctive relief to close the dispensary for not operating in compliance with the Michigan Medical Marijuana Act (MMMA).[416] The trial court held a two-day hearing, after which it denied injunctive relief.[417] The trial court made two main findings of fact.[418] The court found that even though the defendants owned the dispensary lockers that it rented to its members, the members possessed the marijuana kept in the lockers.[419] Second, the trial court found the defendants did not have any possessory interest in the marijuana stored

409. *Id.* at 230.
410. *Id.* at 230-31.
411. *Id.* at 233-34.
412. People v. Bylsma, 493 Mich. 17; 825 N.W.2d 543 (2012).
413. *Id.* at 36. *See* People v. Kolanek, 491 Mich. 382; 817 N.W.2d 528 (2012).
414. *Bylsma,* 493 Mich. at 37.
415. State v. McQueen, 293 Mich. App. 644, 647-48; 811 N.W.2d 513 (2011).
416. *Id.* at 648.
417. *Id.*
418. *Id.* at 653 (explaining the trial court's findings).
419. *Id.*

in the lockers, but merely facilitated the transfer of the marijuana between patients.[420] The prosecutor appealed.[421]

The court of appeals reversed.[422] The court found the dispensary violated the terms of the MMMA in several ways.[423] First, the court of appeals concluded that the defendants did possess the marijuana, contrary to the trial court's finding, because they "exercise[d] dominion and control over the marijuana that is stored in the lockers" rented to the members.[424] The court equated this control to having possession of the marijuana.[425] Similarly, the appellate court found that the defendants were selling the marijuana for the members.[426] The court concluded that the MMMA does not provide for patient to patient sales of marijuana, which the defendants were doing at the dispensary.[427] The court also found the defendants were not entitled to immunity under the MMMA for persons who assist a registered qualifying patient with "using or administering" marijuana, because they were "engaged in the selling of marijuana."[428] Finally, the court found the dispensary was a "public nuisance" because it operated outside of the guidelines of the MMMA and the Public Health Code.[429] The court "remanded for entry of judgment in favor of" the plaintiff prosecutor and to enjoin the operation of the dispensary.[430] On February 8, 2013, the Supreme Court of Michigan affirmed on other grounds, finding that, although "medical use" includes sale of marijuana, the defendants are not entitled to operate a business conducting patient to patient sales of marijuana.[431] The court concluded that such sales do not comply with the MMMA, and therefore the plaintiffs were entitled to injunctive relief as the business was a public nuisance.[432]

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420. *Id.*

421. *McQueen*, 293 Mich. App. at 652.

422. *Id.* at 675.

423. *Id.* at 663-73 (applying the MMMA statutory framework to defendants' operation of a dispensary).

424. *Id.* at 654.

425. *Id.*

426. *Id.*

427. *McQueen*, 293 Mich. App. at 666-70 (citing MICH. COMP. LAWS ANN. §§ 333.26423(e), .26424(e), (k) (West 2012)).

428. *Id.* at 673 (citing MICH. COMP. LAWS ANN. § 26424(i)).

429. *Id.* at 674 (citing §§ 333.26421-.26430 and MICH. COMP. LAWS ANN. §§ 333.1111, .7104-.7404 (West 2012)).

430. *Id.* at 675.

431. State v. McQueen, 493 Mich. 135; 828 N.W.2d 644 (2013).

432. *Id.* at 135.

The *McQueen* decision stands in direct contrast to *People v. Green*,[433] in which the Michigan Court of Appeals held that marijuana could be delivered or transferred between qualifying patients under the MMMA absent the exchange of compensation. Such transfer is specifically included in the MMMA's definition of "medical use" the court wrote.[434]

VIII. OPERATING A MOTOR VEHICLE WHILE IMPAIRED

In *City of Plymouth v. Longeway*, the "[d]efendant was charged with operating a vehicle while intoxicated (OWI)."[435] She moved to dismiss the charge because she believed she was not "operating" the vehicle as defined by the statute.[436] The police observed the defendant in the parking lot of a bar, inside a car.[437] The car appeared to be in reverse gear and the brake lights were on.[438] The vehicle moved only slightly, as if being shifted into park again.[439] The defendant, in the driver's seat, told the officer they were not leaving, but merely looking for a jacket in the car.[440] Police charged the defendant with OWI, and defendant argued that she had not operated the vehicle, as it was stationary and never left the parking lot.[441] The district court denied her motion, noting the statutory definition of "operating" is "being in actual physical control of a vehicle regardless of whether or not the person is licensed."[442]

Defendant appealed to the circuit court, which reversed.[443] The circuit court relied on *People v. Wood*,[444] which held that a vehicle has to be "in motion, or in a position posing a significant risk of causing a collision."[445] The prosecutor appealed.[446]

The court of appeals reversed and remanded for reinstatement of the charge.[447] The court held that the defendant operated the vehicle within

433. 2013 WL 336650 (Mich. Ct. App. Jan. 20, 2013).
434. *Id.*
435. 296 Mich. App. 1, 2; 818 N.W.2d 419 (2012) (citing MICH. COMP. LAWS ANN. § 257.625(1) (West 2012)).
436. *Id.* at 2.
437. *Id.* at 3.
438. *Id.* at 3.
439. *Id.*
440. *Id.*
441. *Longeway*, 296 Mich. App. at 3-4.
442. *Id.* at 4 (citing MICH. COMP. LAWS ANN. § 257.35a (West 2012)).
443. *Id.*
444. 450 Mich. 399, 404; 538 N.W.2d 351 (1995).
445. *Id.* at 4 (citing People v. Wood, 450 Mich. 399, 404; 538 N.W.2d 351 (1995).
446. *Id.* at 2.
447. *Id.* at 11.

the meaning of the statute because she had "actual physical control" of the vehicle.[448] The defendant did not dispute that she started the car, applied the brakes, shifted into reverse, and shifted back into park again, the court noted.[449] The court narrowed the focus to whether the defendant's actions established "actual physical control" of the automobile.[450]

In *Wood*, police found the driver passed out "in his vehicle at a drive-through window of a restaurant."[451] The engine was on, the car "was in drive, and the defendant's foot was on the brake."[452] The *Wood* court concluded that "operating" a vehicle "should be defined in terms of the danger the OUIL statute seeks to prevent: the collision of a vehicle being operating by a person under the influence."[453]

Although Longeway was not an unconscious driver, "she was at all times in *actual physical control* of the vehicle," the court concluded.[454] Given the circumstances, the court found it unnecessary to address whether Longeway also "placed the vehicle in a position posing a significant risk of causing a collision."[455] The court reasoned that "a person clearly has actual physical control of a vehicle when starting the engine, applying the brakes, shifting the vehicle from park to reverse, and then shifting back to park."[456]

The court noted that this position is supported by *People v. Yamat*,[457] a Michigan Supreme Court case decided eleven years after *Wood*.[458] In *Yamat*, the defendant was a passenger in a car who grabbed the steering wheel while arguing with his girlfriend, who was the driver.[459] The car struck a jogger on the side of the road.[460] The court concluded that the defendant had "operated" the vehicle under the definition of the statute, because he had physical control of it at the time of the accident.[461] Although the *Yamat* case addressed the felonious driving statute,[462] the

448. *Id.*
449. *Id.* at 5-6.
450. *Longeway*, 296 Mich. App. at 10 (citing MICH. COMP. LAWS ANN. § 257.35a (West 2012)).
451. *Id.* at 7 (citing *Wood*, 450 Mich. at 402).
452. *Id.*
453. *Id.* at 7-8 (quoting *Wood*, 450 Mich. at 404).
454. *Id.* at 10 (emphasis in original).
455. *Id.*
456. *Longeway*, 296 Mich. App. at 3.
457. 475 Mich. 49, 51; 714 N.W.2d 335 (2006).
458. *Longeway*, 296 Mich. App. at 10 (citing *Yamat*, 475 Mich. at 51).
459. *Yamat*, 47 Mich. at 51.
460. *Id.*
461. *Id.*
462. MICH. COMP. LAWS ANN. § 257.626c (repealed 2010).

Longeway court noted that both the OWI and felonious driving statutes are part of the Michigan Vehicle Code and both use the word "operate."[463] Applying the statutory definition of "operate" as the court did in *Yamat*, the court concluded there was evidence Longeway physically controlled her vehicle, and therefore, operated the vehicle as contemplated by the statute.[464] "The fact that it remained stationary is immaterial," the court wrote.[465]

IX. DEFENSES

A. Imperfect Self-Defense

In *People v. Reese*, the defendant was charged with second-degree murder[466] and, in the alternative, voluntary manslaughter.[467] The defendant owed money to the victim.[468] The defendant shot at the victim while driving by in his car, and they both shot at each other in front of the victim's house.[469] The victim died of a single gunshot to his chest, and the defendant was shot in the leg.[470] The defendant gave three different statements to the police in which he denied knowing who had shot him.[471] At his bench trial, the defendant asserted that he did not shoot the victim, or if he did, that he shot the victim in self-defense.[472] The trial court rejected the claim that defendant did not shoot and kill the victim.[473] The trial court acquitted the defendant of second-degree murder, finding the state had not proven its case.[474] The trial court concluded that the defendant was the initial aggressor, which prompted the victim to pull his gun.[475] The trial court found that the state had proven manslaughter, and that the defendant did not act in lawful self-

463. *Longeway*, 296 Mich. App. at 10 (citing MICH. COMP. LAWS ANN. §§ 257.625(1), 26(c)).
464. *Id.* (citing MICH. COMP. LAWS ANN. § 257.35a and *Yamat*, 475 Mich. at 51).
465. *Id.* at 11.
466. MICH. COMP. LAWS ANN. § 750.317 (West 2012).
467. People v. Reese, 491 Mich. 127, 130; 815 N.W.2d 85 (2012) (citing MICH. COMP. LAWS ANN. § 750.321 (West 2012)).
468. *Id.* at 131.
469. *Id.* at 131-32.
470. *Id.* at 132.
471. *Id.* at 132-33.
472. *Id.* at 131-32.
473. *Reese*, 491 Mich. at 131-32.
474. *Id.* at 134.
475. *Id.* at 134-35.

defense because he was the initial aggressor.[476] The court found the defendant guilty of voluntary manslaughter, and he appealed.[477]

The defendant argued on appeal that the state failed to prove he was the initial aggressor, and therefore, he had a valid claim of self-defense.[478] The court of appeals vacated the manslaughter conviction and remanded for a new trial.[479] The appellate court found the lower court erred in finding the defendant was the initial aggressor and in its application of the doctrine of imperfect self-defense to the facts of the case.[480] The prosecution appealed, and the Michigan Supreme Court granted leave to consider "whether the doctrine of imperfect self-defense can mitigate second-degree murder to voluntary manslaughter and, if so, whether the doctrine was appropriately applied to the facts of this case."[481]

The Michigan Supreme Court reversed the court of appeals.[482] The court first addressed the issue of imperfect self-defense; the trial court found that it applied to the case, but the court of appeals reversed the trial court's verdict, believing the trial court had misapplied it to the facts of the case.[483] The court began its analysis by noting that Michigan "proscribes, but does not define, murder" or manslaughter.[484] Rather, Michigan courts have looked to the common law definitions.[485] Second degree murder, the court wrote, is defined as a death which occurs "by an act of the defendant," with malice, and "without justification or excuse."[486] Manslaughter is distinguished from murder by the lack of malice.[487] The court traced the doctrine of imperfect self-defense in Michigan to a footnote in a 1971 court of appeals opinion, *People v. Morrin*.[488] The court of appeals reversed a second-degree murder conviction in 1980 in *People v. Springer*,[489] based on the defendant's

476. *Id.*
477. *Id.* at 136, 129-30.
478. People v. Reese, No. 292153, 2010 WL 3604400 at *1 (Mich. Ct. App. Sept. 16, 2010), *rev'd*, 491 Mich. 127 (2012).
479. *Id.*
480. *Id.* at *2, *4.
481. *Reese*, 491 Mich. at 139.
482. *Id.* at 130.
483. *Id.* at 140.
484. *Id.* at 142.
485. *Id.*
486. *Id.* at 143 (citing People v. Goecke, 457 Mich. 442, 464; 579 N.W.2d 868 (1998)).
487. *Reese*, 491 Mich. at 143.
488. *Id.* at 147 (citing People v. Morrin, 31 Mich. App. 301, 311 n.7; 187 N.W.2d 434 (1971)).
489. 100 Mich. App. 418, 422; 298 N.W.2d 750 (1980), *abrogated by Reese*, 491 Mich. at 150-51.

"imperfect right to self-defense."[490] Following the *Springer* opinion, the court noted that other panels of the court of appeals applied imperfect self-defense where the defendant was the initial aggressor.[491] The court noted, however, that "[u]nder Michigan law, the doctrine of imperfect self-defense does not exist as a freestanding defense that mitigates a murder to manslaughter because it was not recognized as such under the common law at the time the Legislature codified the crimes of murder and manslaughter."[492] Thus, the court wrote, the *Springer* court erred when it adopted the doctrine, because it changed the common law of the state after the legislature codified the common law crimes of murder and manslaughter in 1846.[493] Although rejecting the doctrine of imperfect self-defense, the Michigan Supreme Court noted that such facts may provide grounds for a jury or judge to conclude the malice element of murder had not been proven.[494] Thus, malice can be absent "when the 'direct intent to kill' was caused by 'great provocations sufficient to excite the passions beyond the control of reason,'" the court wrote.[495]

In the instant case, the court determined that the court of appeals erred in finding the trial court's verdict clearly erroneous.[496] The court affirmed the trial court's verdict, finding sufficient evidence to support defendant's conviction for voluntary manslaughter.[497] The trial court was also correct in finding defendant could not assert self defense because he was the initial aggressor.[498] The court reversed the court of appeals decision granting a new trial.[499]

In a separate dissent in which Justices Cavanagh and Hathaway joined, Justice Kelly wrote that she concurred in the majority's decision to reinstate defendant's conviction for manslaughter, but dissented from the finding that imperfect self-defense does not exist in Michigan law.[500] The only issue on appeal, she wrote, was whether the trial court was clearly erroneous in finding defendant guilty of manslaughter and whether that conviction should be reinstated following the court of

490. *Reese*, 491 Mich. at 147-48 (quoting *Springer*, 100 Mich. App. at 421).

491. *Id.* at 148 (citing People v. Vicuna, 141 Mich. App. 486, 493; 367 N.W.2d 887 (1985), People v. Amos, 163 Mich. App. 50, 56-57; 414 N.W.2d 147 (1987), and People v. Butler, 193 Mich. App. 63, 67; 483 N.W.2d 430 (1992)).

492. *Id.* at 150.

493. *Id.* at 151.

494. *Id.*

495. *Reese*, 491 Mich. at 152 (quoting People v. Scott, 6 Mich. 287, 295 (1859)).

496. *Id.* at 157-60.

497. *Id.* at 160.

498. *Id.* at 158-160.

499. *Id.* at 160.

500. *Id.* at 161 (Kelly, J., concurring in part, dissenting in part).

appeals' reversal.[501] The majority's discussion of whether imperfect self-defense should continue to exist in Michigan law was "unnecessary to the resolution of this case and irrelevant" she wrote.[502] Because defendant was acquitted of second degree murder by the trial court, and that charge cannot be brought again, he cannot raise the issue of imperfect self-defense again because it is not a mitigating defense to manslaughter.[503] Therefore, imperfect self-defense does not impact the issue on appeal and it should not have been discussed by the majority, she believed.[504]

B. Duty to Retreat

In *People v. Richardson*, the defendant and his wife had a poor relationship with their neighbors resulting in several altercations.[505] This culminated in an incident when several neighbors threw rocks and approached defendant's porch with a baseball bat.[506] After a few minutes, the defendant fired one of his handguns toward the group, wounding two people.[507] The defendant "was charged with two counts of assault with intent to commit murder,[508] two counts of assault with intent to do great bodily harm less than murder,[509] two counts of felonious assault,[510] and one count of felony-firearm."[511] At trial, the defendant claimed he acted in self-defense.[512] The trial court instructed the jury as follows:

> (1) A person can use deadly force in self-defense only where it is necessary to do so. If the defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the defendant honestly and reasonably believed [he/she] needed to use deadly force in self-defense.
>
> (2) However, a person is never required to retreat if attacked in [his/her] own home, nor if the person reasonably believes that an

501. *Reese*, 491 Mich. at 161-62.
502. *Id.*
503. *Id.*
504. *Id.* at 162.
505. People v. Richardson, 490 Mich. 115, 117; 803 N.W.2d 302 (2012).
506. *Id.*
507. *Id.* at 118.
508. MICH. COMP. LAWS ANN. § 750.83 (West 2012).
509. MICH. COMP. LAWS ANN. § 750.84.
510. MICH. COMP. LAWS ANN. § 750.82.
511. *Richardson*, 490 Mich. at 118 (citing MICH. COMP. LAWS ANN. § 750.227b).
512. *Id.*

> attacker is about to use a deadly weapon, nor if the person is subject to a sudden, fierce, and violent attack.[513]

"[T]he prosecutor never argued that defendant was required to" retreat from the argument; rather, he argued that defendant had not established that he "reasonably believed he needed to use deadly force."[514]

During deliberations, the jury sent a note asking the court to define "home," to which the court responded that "an individual has no duty to retreat before using deadly force if in his or her own home or in the curtilage of that dwelling."[515] The court also explained that "curtilage" "means land or a yard adjoining a house, usually within an enclosure."[516] The jury sent another note to the court days later, indicating "they could not reach a decision."[517] The court reinstructed the jury on self-defense, and asked them to reread the jury instructions and continue deliberating.[518] The court did not reinstruct the jury on the definition of curtilage, and "[d]efendant objected to the refusal" of the court to reinstruct them on that term.[519]

The Michigan Supreme Court affirmed.[520] The trial court's instructions to the jury on self-defense were nearly identical to the pattern jury instruction, the court noted.[521] The court held that defendant had not established it was plain error for the trial court to use the pattern jury instruction.[522] The court stated that the "instruction correctly told the jurors that, if defendant was in his home, he did not have to retreat. It also correctly informed them that defendant was entitled to use deadly force in self-defense only if it was necessary to do so."[523]

The court reasoned,

> An instruction that omitted the general duty to retreat and informed the jury only that defendant had no duty to retreat might have been clearer. However, defense counsel did not ask the court to give such an instruction. And defendant was not

513. *Id.* at 118-19 (quoting Mich. Civ. J.I. 2d 7.16).
514. *Id.* at 120.
515. *Id.* at 119.
516. *Id.*
517. *Richardson*, 490 Mich. at 119.
518. *Id.*
519. *Id.*
520. *Id.* at 123.
521. *Id.* at 120.
522. *Id.*
523. *Richardson*, 490 Mich. at 120.

> prejudiced by this omission because the jury was, in fact, informed that a person attacked in his or her home has no duty to retreat. It was also instructed that a person's porch is considered part of his or her home.[524]

Finally, the court emphasized that defendant's self-defense claim would have been successful only if he "honestly and reasonably believed that it was necessary to use deadly force while standing his ground."[525] Given the guilty verdict, the court concluded that the jury must have found that deadly force was unnecessary.[526] Therefore, the defendant's claims were rejected.[527]

Justice Markman dissented, finding that the jury instructions were improper, and that the defendant had "no duty or obligation to retreat."[528] He opined that the jury should not have been permitted to consider retreat in their deliberations.[529] It was plain error, he wrote, for the jury to be instructed that retreat could be a factor in deciding whether defendant's use of force was necessary.[530] He found this error prejudicial to the defendant and believed it undermined "a quintessential right of a free society—the right of personal self-defense."[531] Therefore, he would reverse the court of appeals and remand for a new trial in which the jury would be instructed that retreat could not be considered, "because defendant had no duty to retreat."[532]

X. CRIMINAL ISSUES AT TRIAL

In *People v. Buie*, the issue centered upon the trial court permitting two expert witnesses to testify through two-way, interactive video technology at defendant's trial for first-degree criminal sexual conduct.[533] The witnesses were a doctor who examined the victims following the assault, and a DNA analyst.[534] Following defendant's

524. *Id.* at 120-21.
525. *Id.* at 122.
526. *Id.*
527. *Id.* at 123.
528. *Id.* at 144 (Markman, J., dissenting).
529. *Richardson*, 490 Mich. at 144 (Markman, J., dissenting).
530. *Id.*
531. *Id.*
532. *Id.*
533. 491 Mich. 294, 297; 817 N.W.2d 33 (2012) (citing MICH. COMP. LAWS 750.520b(1)(a) (West 2012)).
534. *Id.* at 297-98.

conviction by jury, and sentencing to life imprisonment, he appealed.[535] The court of appeals remanded to the trial court to determine whether permitting the video procedure was necessary "to further an important public policy or state interest."[536] The trial court held an evidentiary hearing and found "no error in permitting the video procedure because it furthered several state interests or public policies and the defendant consented to the procedure."[537] The defendant appealed again.

The court of appeals reversed.[538] The court noted a provision in the Michigan Court Rules that allows a trial court to utilize video technology to take trial testimony.[539] Although the trial court in this case found good cause to utilize the technology, and that the defendant had consented, the appellate court disagreed that consent had been shown.[540] Defense counsel stated at the evidentiary hearing that the defendant had objected to the procedure, and defendant testified that he asked counsel to object.[541] Because the court rule states that the objecting party does not have to "articulate any reason for not consenting," the court of appeals found the trial court's use of the video testimony of the two expert witnesses was an error.[542] As the expert's testimony was highly relevant to establishing the essential element of the identity of the attacker in this case, the court found, the trial court's error was not harmless and required reversal and a new trial.[543]

On May 25, 2011, the Michigan Supreme Court granted leave to appeal the court of appeals' judgment.[544] The court requested the parties

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535. *See* People v. Buie, 285 Mich. App. 401, 402; 775 N.W.2d 817 (2009), *appeal denied*, 485 Mich. 1105; 779 N.W.2d 81 (2010).

536. *Id.* at 418-19.

537. *See* People v. Buie, 291 Mich. App. 259, 262; 804 N.W.2d 790 (2011) (discussing the trial court's findings), *rev'd*, 491 Mich. 294; 817 N.W.2d 33 (2012).

538. *Id.* at 275-76.

539. *Id.* at 271 n.2 (quoting MICH. CT. R. 6.006(c) (West 2013)). Michigan Court Rule 6.006(c) states:

> As long as the defendant is either present in the courtroom or has waived the right to be present, upon a showing of good cause, district and circuit courts may use two-way interactive video technology to take testimony from a person at another location in the following proceedings:
> * * * *
> (2) with the consent of the parties, trials. A party who does not consent to the use of two-way interactive video technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.

MICH. CT. R. 6.006(c).

540. *See Buie*, 291 Mich. App. at 271-72.

541. *Id.* at 273-74.

542. *Id.* at 274 (citing MICH. CT. R. 6.006(c)).

543. *Id.* at 275.

544. People v. Buie, 489 Mich. 938, 938; 797 N.W.2d 640 (2011).

address: "(1) whether defense counsel's agreement to allow" the witnesses to testify by video "waived any of the defendant's rights under the Confrontation Clause"; "(2) whether there was good cause for the use of" the video technology pursuant to the court rule; "(3) whether the parties consented to the use of" the video technology at trial pursuant to the court rule; and "(4) whether there was plain error affecting the defendant's substantial rights."[545]

The Michigan Supreme Court reversed the court of appeals' judgment, finding "that defendant waived his right of confrontation under the United States and Michigan Constitutions and that the court rule was not violated."[546] The court determined that defendant's attorney waived the right of confrontation as trial strategy, and since defendant did not object on the record, the waiver by counsel was reasonable.[547] The court also found that the defendant waived his right of confrontation because he did not object to the use of the video testimony.[548] Thus, the court disagreed with the court of appeals, and found that the "trial court's findings were not clearly erroneous."[549] In addition, the court found no violation of the court rule, stating "the trial court did not abuse its discretion by concluding that good cause for using video testimony was shown. Thus, MCR 6.006(c) was satisfied, and the use of video testimony was proper."[550]

In a separate dissent, Justice Cavanagh wrote that he "would affirm the judgment of the court of appeals, which vacated defendant's convictions, and remand for a new trial."[551] He believed the public policy interests the "trial court relied on to justify allowing video testimony did not outweigh defendant's right of confrontation."[552] He would conclude that an attorney cannot waive a client's right of confrontation, even if the client does not object to the waiver.[553]

545. *Id.*
546. People v. Buie, 491 Mich. 294, 320; 817 N.W.2d 33 (2012).
547. *Id.* at 315, 317-18.
548. *Id.* at 317-18.
549. *Id.*
550. *Id.* at 320.
551. *Id.* at 321 (Cavanagh, J., dissenting).
552. *Buie*, 491 Mich. at 321.
553. *Id.*

XI. SENTENCING ISSUES

A. Holmes Youthful Trainee Act (HYTA)

In *People v. Khanani*, the defendant pled guilty in three separate cases.[554] The first case involved identity theft[555] and "stealing or retaining a financial transaction device without consent."[556] In the second case, he pled guilty to "breaking and entering a vehicle causing damage,"[557] "larceny from a motor vehicle,"[558] and "stealing a financial transaction device without consent."[559] In the third case, he pled guilty to first-degree home invasion.[560] The defendant was sentenced in each case to one year in jail and three years of probation under the Holmes Youthful Trainee Act (HYTA).[561] The prosecutor appealed.[562]

The court of appeals reversed and remanded for resentencing of all three of defendant's cases.[563] Although a trial court has "wide discretion" to determine a sentence, the court wrote, the decision to give the defendant the benefit of the HYTA program was unreasonable.[564] At the plea hearing in the first two cases, the trial court indicated it was considering HYTA, and three weeks later the nineteen-year-old defendant committed the third offense, a home invasion.[565] In light of the defendant's age, the seriousness of the home invasion, and the timing of that offense, the defendant was not an appropriate candidate for the HYTA program, the court concluded.[566]

B. Mandatory Lifetime Electronic Monitoring

In *People v. Cole*, the defendant pled guilty to second-degree criminal sexual conduct.[567] The trial court sentenced him to five to fifteen

554. 296 Mich. App. 175, 177; 817 N.W.2d 655 (2012).
555. MICH. COMP. LAWS ANN. § 445.65 (West 2012).
556. *Khanani*, 296 Mich. App. at 177 (citing MICH. COMP. LAWS ANN. § 750.157n(1) (West 2012)).
557. *Id.* (citing MICH. COMP. LAWS ANN. § 750.356a(3)).
558. *Id.* (citing MICH. COMP. LAWS ANN. § 750.356a(1)).
559. *Id.* (citing MICH. COMP. LAWS ANN. § 750.147n(1)).
560. *Id.* (citing MICH. COMP. LAWS ANN. § 750.110a(2) (West 2012)).
561. *Id.*
562. *Khanani*, 296 Mich. App. at 177.
563. *Id.*
564. *Id.* at 179.
565. *Id.* at 179-80.
566. *Id.*
567. 491 Mich. 325, 327; 817 N.W.2d 497 (2012) (citing MICH. COMP. LAWS ANN. § 750.520c(1)(a) (West 2012)).

years imprisonment, to be followed with lifetime electronic monitoring after his release from prison.[568] The defendant moved to withdraw his plea, arguing his plea was involuntary because the court did not advise him of the mandatory lifetime electronic monitoring at the time of the plea.[569] "The trial court denied the motion," and the court of appeals reversed in an unpublished opinion.[570]

The Michigan Supreme Court affirmed.[571] The court concluded "that mandatory lifetime electronic monitoring is [a] part of the sentence itself," rather than merely a collateral consequence of the plea or sentence.[572] Although the trial court conformed to the court rules by advising the defendant of the minimum and maximum sentence of imprisonment at the time of the plea, the court found that the Due Process Clause requires that a court inform a defendant of all direct consequences of the plea, which would include mandatory lifetime electronic monitoring.[573]

C. Restitution

In *People v. Allen*, the defendant pleaded guilty to attempting to commit prescription fraud.[574] The defendant was a customer service representative for a health insurance vendor, and through her employment she had access to the confidential records of the insurance company, including all information about the subscribers.[575] She used this information to attempt to obtain a prescription in a subscriber's name.[576] The trial court sentenced Allen to one year of probation and ordered her to pay $5,753.88 in restitution to the insurance company.[577] The trial court held a hearing on the restitution issue, at which an investigator for the insurance company testified that her investigation was more time-consuming than a normal fraud investigation because the defendant had access to private information regarding the insurance company's subscribers.[578] As a result, the investigator had to extend the

568. *Id.* at 329.
569. *Id.*
570. *See* People v. Cole, No. 298893, 2011 WL 895243 (Mich. Ct. App. Mar. 15, 2011), *aff'd*, 491 Mich. 325; 817 N.W.2d 487 (2012).
571. *Cole*, 491 Mich. at 327.
572. *Id.*
573. *Id.* at 337.
574. People v. Allen, 295 Mich. App. 277, 278; 813 N.W.2d 806 (2011) (citing MICH. COMP. LAWS ANN. §§ 333.7407(1)(c), .7407a(1) (West 2012)).
575. *Id.*
576. *Id.*
577. *Id.*
578. *Id.* at 279.

investigation into whether the defendant misused confidential information.[579] Although the investigator was a salaried employee and would have been paid the same amount of salary if the defendant had not committed the fraud, the investigator testified that the insurance company suffered a loss because it could have spent the money used in the investigation on claims or controlling premiums.[580] The trial court concluded that the defendant had to pay the requested amount of $5,753.88 in restitution to the insurance company.[581] The defendant appealed, arguing that the insurance company was not a "victim" entitled to restitution under the Crime Victim's Rights Act.[582]

The court of appeals affirmed.[583] Although the investigator was a salaried employee and would have been paid the same amount even if the defendant had not committed the fraud, the court found the insurance company "lost the time-value of" the forty-four hours the investigator had to spend in the fraud investigation.[584] It was the loss of time, the court noted, that was a direct financial harm to the insurance company[585] Thus, the trial court did not err in ordering the restitution.[586]

XII. DOUBLE JEOPARDY

A. Differing Elements of the Offense

In *People v. Strickland*, the defendant was convicted of breaking into the home of an elderly couple and assaulting the husband.[587] The husband had "armed himself with a gun," and the defendant tried to take it away from him.[588] The gun went off three times, and the homeowner was shot in the hand.[589] He was charged with first-degree home invasion,[590] assault with intent to do great bodily harm less than murder,[591] felon in possession of a firearm,[592] felonious assault,[593] and

579. *Id.* at 280
580. *Allen*, 295 Mich. App. at 280.
581. *Id.*
582. *Id.* at 281-82 (citing MICH. COMP. LAWS ANN. § 780.766(1)-(2) (West 2012)).
583. *Id.* at 283.
584. *Id.*
585. *Id.*
586. *Allen*, 295 Mich. App. at 283.
587. People v. Strickland, 293 Mich. App. 393, 396; 810 N.W.2d 660 (2011), *appeal denied*, 490 Mich. 1002; 807 N.W.2d 321 (2012).
588. *Id.*
589. *Id.*
590. MICH. COMP. LAWS ANN. § 750.110a(2) (West 2012).
591. MICH. COMP. LAWS ANN. § 750.84 (West 2012).
592. MICH. COMP. LAWS ANN. § 750.224f (West 2012).

possession of a firearm during the commission of a felony.[594] He was sentenced as a fourth-degree habitual offender to 320 months to sixty years in prison for the first-degree home invasion, concurrent to the sentences for the other offenses.[595] On appeal, he argued that his dual convictions for both assault with intent to do great bodily harm less than murder and felonious assault violate double jeopardy.[596]

The court of appeals rejected defendant's argument and affirmed his convictions.[597] The court pointed out that the Michigan Supreme Court addressed this issue in *People v. Stawther*,[598] and found that convictions for both offenses do not violate double jeopardy because the two offenses have different elements.[599] The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do corporal harm to another, i.e., an assault, and (2) an intent to do great bodily harm less than murder.[600] The felonious assault statute provides:

> (1) Except as provided in subsection (2), a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.[601]

"In a felonious assault case, the jury must be instructed that . . . defendant must have either an intent to injure his victim or an intent to put the victim in reasonable fear or apprehension of an immediate battery."[602] Although both statutes require an assault, the felonious assault statute requires the use of a dangerous weapon, and does not

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593. MICH. COMP. LAWS ANN. § 750.82.

594. MICH. COMP. LAWS ANN. § 750.227b.

595. 293 Mich. App. 393, 396; 810 N.W.2d 660 (2011). The defendant was sentenced to two to twenty years for the assault with intent to do great bodily harm conviction; two to five years for the felon in possession conviction; and two to fifteen years for the felonious assault conviction, consecutive to a two-year term for the felony firearm conviction. *Id.*

596. *Id.* at 401. *See* U.S. CONST. amend. V.

597. *Strickland*, 293 Mich. App. at 402.

598. 480 Mich. 900, 900; 739 N.W.2d 82 (2007).

599. *Strickland*, 293 Mich. App. at 402 (citing *Stawther*, 480 Mich. 900).

600. People v. Brown, 267 Mich.App. 141, 147; 703 N.W.2d 230 (2005) (citing MICH. COMP. LAWS ANN. § 750.84 (West 2012)).

601. MICH. COMP. LAWS ANN. § 750.82 (West 2012).

602. People v. Yarborough, 131 Mich. App. 579, 580-81; 345 N.W.2d 650 (1983).

require an intent to inflict great bodily harm less than murder.[603] Therefore, a defendant can be convicted of both offenses as they have distinct elements from each other.[604]

In *People v. Williams*, the defendant was convicted of being a prisoner in possession of a controlled substance[605] and delivery of marijuana.[606] He was ordered to serve thirty-four months to thirty years imprisonment for the prisoner in possession conviction, and thirty-four months to fifteen years imprisonment for the delivery conviction, consecutive to each other and to the domestic violence sentence he was already serving when he committed the offenses.[607] He argued on appeal that his conviction for both offenses violated his double jeopardy rights, because they both stemmed from a single event.[608]

The court of appeals affirmed.[609] The court rejected defendant's argument, finding that the offenses in this case each possess an element not found in the other.[610] The court explained that to be convicted of prisoner in possession of a controlled substance, a person must be a prisoner.[611] This offense also does not require the delivery of the substance, merely its possession.[612] To be convicted of delivery of marijuana, a person need not be a prisoner, but must merely deliver the marijuana.[613] Accordingly, the court found, because the offenses "require[] proof of a fact that the other does not," there was no double jeopardy violation.[614]

B. Entry of Directed Verdict of Acquittal

In *People v. Evans*, the defendant sought to prevent his retrial for arson charges by asserting that double jeopardy barred retrial.[615] The defendant was accused of burning a vacant house, and charged with

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603. *See* MICH. COMP. LAWS ANN. §§ 750.82, .84.

604. *Stawther*, 480 Mich. at 900.

605. MICH. COMP. LAWS ANN. § 801.263(2) (West 2012).

606. People v. Williams, 294 Mich. App. 461, 465; 811 N.W.2d 88 (2011), *appeal denied*, 491 Mich. 854; 808 N.W.2d 786 (2012) (citing MICH. COMP. LAWS ANN. § 333.7401(1), (2)(d)(iii) (West 2012).

607. *Id.* at 465.

608. *Id.* at 468-69 (citing U.S. CONST. amend. V and MICH. CONST. art. 1, § 15).

609. *Id.* at 465.

610. *Id.* at 470.

611. *Id.* (citing MICH. COMP. LAWS ANN. § 801.263(2) (West 2012)).

612. *Williams*, 294 Mich. App. at 470.

613. *See* MICH. COMP. LAWS ANN. § 333.7401(1) (West 2012).

614. *Williams*, 294 Mich. App. at 470 (quoting People v. Nutt, 469 Mich. 565, 576; 677 N.W.2d 1 (2004)).

615. 491 Mich. 1, 9; 810 N.W.2d 535 (2012).

burning other real property.[616] At trial, the court mistakenly held that the prosecution was required to prove the burned house was not a dwelling, which is not an element of the offense.[617] At the close of the prosecution's proofs, defense counsel moved for a directed verdict, arguing the prosecution's evidence only showed the burned building was a dwelling house.[618] The trial court granted the defendant's motion for a directed verdict and entered an order of acquittal, dismissing the case.[619] The prosecution appealed, and the court of appeals reversed and remanded for a new trial.[620]

The court of appeals noted that in *People v. Nix*,[621] the Michigan Supreme Court held that retrial is barred when a trial court grants a directed verdict of acquittal, even when the trial court is "'wrong with respect to whether a particular factor is an element of the charged offense.'"[622] However, the court believed that statement was dicta, and relied on the dissent in *Nix* to support its conclusion that "an actual acquittal occurs, for double jeopardy purposes, 'only when the trial court's action, whatever its form, is a resolution in the defendant's favor, correct or not, of a factual element necessary for a criminal conviction.'"[623] The panel concluded that double jeopardy did not bar Evans' retrial since the trial court did not resolve a factual element need to establish the conviction, but based the directed verdict on an error of law.[624] The defendant appealed.

The Michigan Supreme Court affirmed, holding that a directed verdict, order of acquittal and dismissal of the case was not an acquittal for double jeopardy purposes.[625] The court noted that it had addressed this issue in *People v. Nix*,[626] and *People v. Szalma*.[627] Nix examined the effect of the trial court's finding that the defendant could not be convicted of first-degree murder or first-degree felony-murder because

616. *Id.* at 3 (citing MICH. COMP. LAWS ANN. § 750.73 (West 2012)).
617. *Id.*
618. *Id.* at 5.
619. *Id.* at 4, 8.
620. *See* People v. Evans, 288 Mich. App. 410, 411; 794 N.W.2d 848 (2010), *aff'd*, 491 Mich. 1; 810 N.W.2d 535 (2012), *rev'd by sub. nom.*, Evans v. Michigan, 133 S. Ct. 1069 (2013).
621. 453 Mich. 619, 628-29; 556 N.W.2d 866 (1996).
622. *Evans*, 288 Mich. App. at 417-18 (quoting *Nix*, 453 Mich. at 628).
623. *Id.* at 421-22 (quoting *Nix*, 453 Mich. at 634-35 (Boyle, J., dissenting)).
624. *Id.* at 9 (citing *Evans*, 288 Mich. App. at 423).
625. *Id.* at 20, 25.
626. 453 Mich. 619.
627. *Evans*, 491 Mich. at 15 (citing *Szalma*, 487 Mich. at 718).

she "owed no legal duty to the victim."[628] Thus, in *Nix*, "the trial court [was] factually wrong . . . [as to] whether a particular factor [was] an element of the charged offense."[629] In *Szalma*, the trial court erroneously analyzed the "sufficiency of the evidence to support a conviction of first-degree criminal sexual conduct."[630]

In the present case, the trial court's error was adding an extra element to the offense that did not belong, i.e., proving that the building was not a dwelling.[631] The Michigan Supreme Court indicated that it agreed with the court of appeals that Evans is not barred from retrial because the trial court's ruling dismissing the case was not an acquittal for double jeopardy purposes.[632] The trial court's entry of an order of acquittal does not control, because the "substance of the trial court's ruling" did not resolve any factual elements of the crime charged.[633] Rather, the court found, the trial court's ruling focused exclusively on the extraneous element.[634] Thus, "the trial court's decision was based on an error of law unrelated to defendant's guilt or innocence on the elements of the charged offense, and thus the trial court's dismissal of the charge did not constitute an acquittal."[635]

In a separate dissent in which Justice Kelly joined, Justice Cavanagh would have reversed the judgment of the court of appeals because he believed *Nix* was not dicta, but rather controlling on the issue of whether an acquittal bars retrial under double jeopardy.[636]

In a separate dissent, Justice Hathaway stated she would also have reversed the judgment of the court of appeals for the same reason—that *Nix* is controlling precedent.[637] However, she also wrote that she disagreed with the majority drawing a distinction between a trial court's erroneous ruling on a required element of an offense, and a trial court's erroneous ruling on a mistakenly added element of an offense.[638]

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628. *Id.* at 15 (citing *Nix*, 453 Mich. at 622). The victim in *Nix* died after the defendant's boyfriend locked the victim in her own trunk for six days, during which time the defendant and her boyfriend heard the victim's screams while they used the victim's car. *Id.* at 16 n.41.

629. *Id.* at 16 (quoting *Nix*, 453 Mich. at 628).

630. *Id.* at 17.

631. *Id.* at 20.

632. *Id.*

633. *Evans*, 491 Mich. at 20-21.

634. *Id.* at 21.

635. *Id.*

636. *Id.* at 25-36 (Cavanagh, J., dissenting).

637. *Id.* at 37 (Hathaway, J., dissenting).

638. *Id.* at 36-37.

On February 20, 2013, the Supreme Court of the United States reversed the Michigan Supreme Court.[639] The Court held that a midtrial directed verdict and dismissal, based on the trial court's erroneous requirement of an extra element of the charged offense, was an acquittal for purposes of double jeopardy.[640]

XIII. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Failure to Advise Client of Collateral Consequences of Plea

In *People v. Gomez*, the defendant, a permanent resident alien, pled no contest to possession with intent to deliver less than five kilograms of marijuana.[641] He served a sentence of 120 days in prison and twenty-four months of probation, and was discharged in 2005.[642] Four years later, he was notified by the Department of Homeland Security that his conviction made him eligible for deportation from the United States.[643] The defendant filed a motion for relief from judgment, shortly after the United States Supreme Court decision of *Padilla v. Kentucky*,[644] which held that criminal defense attorneys must advise defendants when a guilty plea will render them subject to deportation.[645] Defendant asserted that neither defense counsel nor the trial court ever advised him that a guilty plea would render him subject to deportation.[646] He contended that if he had been told that his plea would affect his immigration status, he would have gone to trial, and that his attorney was ineffective.[647] The trial court denied the motion, finding *Padilla* did not apply retroactively to the defendant.[648] The defendant appealed.[649]

The court of appeals affirmed.[650] The court held that *Padilla* amounted to a new rule of criminal procedure under federal law.[651] The

639. Evans v. Michigan, 133 S.Ct. 1069 (2013).

640. *Id.*

641. 295 Mich. App. 411, 413; 820 N.W.2d 217 (2012) (citing MICH. COMP. LAWS ANN. § 333.7401(1), (2)(d)(iii) (West 2012)).

642. *Id.* at 413.

643. *Id.*

644. 559 U.S. 356 (2010).

645. *Gomez*, 295 Mich. App. at 413.

646. *Id.* at 413-14.

647. *Id.* at 414.

648. *Id.*

649. *Id.*

650. *Id.* at 413.

651. *Gomez*, 295 Mich. App. at 418. The court noted that the Sixth Circuit Court of Appeals, which has jurisdiction over federal appeals from Michigan, Kentucky, Tennessee, and Ohio, "has not ruled on [this] issue, but [did deny] relief from a judgment

court found that this new rule did not, under federal law, apply retroactively to the defendant because the court found no federal precedent that required retroactive application.[652] The court also found that the new rule did not apply retroactively to the defendant under state law.[653] The court declined to broaden the applicability of *Padilla* for two reasons:

> First, the pre-*Padilla* Michigan precedent expressly stated that 'a failure by counsel to give immigration advice does *not* render [defense counsel's] representation constitutionally ineffective.' *People v. Davidovich*, 463 Mich. 446, 453, 618 N.W.2d 579 (2000)(emphasis added). To apply *Padilla* retroactively would be to allow any offender to negate an earlier acknowledgment of guilt merely by asserting a potential immigration issue. Nothing in Michigan case law allows withdrawal of guilty pleas on this basis.
>
> Second, the Michigan retroactivity analysis mandates that *Padilla* be applied prospectively only. Three factors govern the Michigan retroactivity analysis: '(1) the purpose of the new rules; (2) the general reliance on the old rule [;] and (3) the effect of retroactive application of the new rule on the administration of justice.'[654]

Accordingly, the trial court did not abuse its discretion[655] in denying defendant's motion for relief from judgment.[656]

B. Failure to Object to Erroneous Jury Instructions

In *People v. Eisen*, the defendant argued his counsel was ineffective for failing to object to a jury instruction which omitted a required element of the offense of conviction.[657] The defendant was convicted of

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in a *Padilla* challenge on [the basis] that the defendant failed to establish prejudice." *Id.* at 415 (citing Pilla v. United States, 668 F.3d 368, 373 (6th Cir. 2012)).

652. *Id.* at 417-18.

653. *Id.* at 418.

654. *Id.* at 418 (quoting People v. Maxson, 482 Mich. 385, 393; 759 N.W.2d 817 (2008), and People v. Sexton, 458 Mich. 43, 60-61; 580 N.W.2d 404 (1998)).

655. The standard of review was whether the trial court abused its discretion in denying the defendant's motion. *Id.* at 414 (citing People v. Swain, 288 Mich. App. 609, 628; 794 N.W.2d 92 (2010)).

656. *Gomez*, 295 Mich. App. at 419.

657. People v. Eisen, 296 Mich. App. 326, 329; 820 N.W.2d 229 (2012), *appeal denied*, 493 Mich. 918; 823 N.W.2d 596 (2012).

three counts of first-degree criminal sexual conduct,[658] and one count of third-degree criminal sexual conduct[659] at trial.[660] He was acquitted of a fourth count of first-degree criminal sexual conduct.[661] He appealed, arguing an element of three of the first-degree criminal sexual conduct charges was omitted in the final jury instructions.[662]

The court of appeals found that the jury instructions were clearly erroneous, yet affirmed defendant's convictions.[663] The trial court's instructions did not tell the jury it needed to find that the victim had been younger than thirteen years old at the time of the charged conduct.[664] The court even agreed that defendant's attorney should have objected to the jury instructions and that his conduct fell below an objective standard of reasonableness.[665] The court noted that the verdict form, however, did state that the victim had to be younger than thirteen at the time, and that form is part of the package of jury instructions.[666] Although the trial court committed error, the court found that "the prejudicial effect of that error was significantly reduced by the presence of the proper elements on the verdict form."[667] Moreover, the evidence that the victim was younger than thirteen, was overwhelming, and this element was not challenged at trial, the court noted.[668] Thus, the jury instructions were imperfect but did sufficiently protect the defendant's rights, the court concluded.[669]

C. Lack of Meaningful Adversarial Testing

In *People v. Gioglio*,[670] defendant Jeffrey Paul Gioglio was convicted by jury of two counts of second-degree criminal sexual conduct involving his young niece.[671] The trial court sentenced him to 80 to 270 months in prison.[672] On appeal, he argued that he had ineffective assistance of trial counsel because his attorney did not make an opening statement, and did not present any witnesses or evidence for the

658. MICH. COMP. LAWS ANN. § 750.520b(1) (West 2012).
659. MICH. COMP. LAWS ANN. § 750.520d(1)(b).
660. *Eisen*, 296 Mich. App. at 328.
661. *Id.*
662. *Id.* at 329.
663. *Id.* at 330-31.
664. *Id.* at 330.
665. *Id.* (citing People v. Frazier, 478 Mich. 231, 243; 733 N.W.2d 713 (2007)).
666. *Eisen*, 296 Mich. App. at 330.
667. *Id.*
668. *Id.*.
669. *Id.* at 331.
670. 296 Mich App. 12; 815 N.W.2d 589 (2012).
671. People v. Gioglio, 292 Mich. App. 173, 175; 807 N.W.2d 372 (2011).
672. *Id.*

defense.[673] She also failed to cross-examine several witnesses, and failed to object on many occasions.[674] "Examining [defense counsel's] handling of the defense as a whole," the court stated, "we conclude that she completely failed to submit the prosecution's case to the meaningful adversarial testing contemplated under the Sixth Amendment to the United States Constitution and the Michigan Constitution."[675] The court of appeals faulted the trial court for analyzing defendant's motion for a new trial under *Strickland v. Washington*,[676] rather than *United States v. Cronic*.[677] The court of appeals noted that the present case implicates the second prong of the test set forth in *Cronic*, which addresses "the failure to meaningfully test the prosecution's case."[678] At an evidentiary hearing on the motion for new trial, the prosecutor testified that defense counsel thought defendant was guilty and had expressed a strong dislike for him.[679] The court of appeals believed defense counsel's decision not to cross-examine the victim was not reasonable trial strategy, but rather was a choice because defense counsel believed the victim was being truthful and should not have to be put through a cross-examination.[680]

In reversing and remanding for a new trial, the court concluded:

> We recognize that the presumption of prejudice under *Cronic* will apply only in the most extraordinary of cases. We believe that this is such a case . . . Whatever the faults in our system, we have no difficulty concluding that the vast majority of criminal defense lawyers not only subject the prosecution to meaningful adversarial testing, but also do so in a professional and effective

673. *Id.* at 196.

674. *Id.* at 197-201.

675. *Id.* at 201.

676. 466 U.S. 668 (1984).

677. *Gioglio*, 296 Mich. App. at 192, 195 (citing United States v. Cronic, 466 U.S. 648, 659 (1984)). *Cronic* requires a defendant's trial counsel subject the prosecution's case to "meaningful adversarial testing." *Cronic*, 466 U.S. at 659. The Court noted that some circumstances involving trial counsel's performance are likely to prejudice the accused, for example, (1) where the defendant was completely denied the assistance of counsel at a critical stage; (2) where the defendant's trial counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (3) "where the circumstances under which the defendant's trial counsel functions are such that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* at 658-60.

678. *Gioglio*, 292 Mich. App. at 195.

679. *Id.* at 203.

680. *Id.* at 204.

> way. This was one of those rare trials where that was not the case.[681]

The court of appeals reversed and remanded for a new trial and the prosecution appealed.[682]

In an order dated September 21, 2011, the Michigan Supreme Court, in lieu of granting leave to appeal, reversed the judgment of the court of appeals.[683] The court wrote that *United States v. Cronic* did not apply to defense counsel's actions in the case, for the reasons stated in the court of appeals' dissenting opinion.[684] The court remanded the case to the court of appeals "for consideration of whether defense counsel's performance was ineffective under *Strickland v. Washington*."[685]

The court of appeals affirmed the reversal of the Michigan Supreme Court, finding that defendant had failed to establish that he did not receive effective assistance of counsel.[686] Under *Strickland*, the defendant must show that "counsel's representation fell below an objective standard of reasonableness" and there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[687] Reviewing courts are required to give counsel the benefit of the doubt, the court noted, because there are "countless ways to provide effective assistance of counsel in any given case."[688] Thus, if there might have been a legitimate strategic reason for the act or omission, the court must conclude trial counsel was acting within the range of reasonable professional conduct.[689]

In the present case, Gioglio argued that his attorney betrayed the attorney-client privilege in telling the prosecutor he had admitted to committing the offense.[690] The trial court found that the conversations between the parties were plea negotiations.[691] The court of appeals

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681. *Id.* at 209.

682. *Id.*

683. People v. Gioglio, 490 Mich. 868, 868; 802 N.W.2d 612 (2011).

684. *Id.* The dissent believed the trial court had not erred in finding defendant received effective assistance of counsel, and that the record showed the evidence against defendant was overwhelming. *Gioglio*, 292 Mich. App. at 238 (Kelly, J., dissenting). In addition, the dissent criticized the majority's use of *Cronic* as the standard in such appeals, believing the traditional *Strickland* standard more appropriate. *Id.* at 213.

685. 466 U.S. 668 (1984).

686. *Gioglio*, 296 Mich. App. at 29.

687. *Id.* at 22 (quoting *Strickland*, 466 U.S. at 688, 694).

688. *Id.*

689. *Id.* at 22-23.

690. *Id.* at 24.

691. *Id.*

deferred to the trial court's factual findings, and concluded that Gioglio had failed to establish his claim.[692]

Gioglio also argued that his defense attorney was biased against him, believing he was guilty and therefore not representing him effectively.[693] The trial court did not agree that defense counsel had exhibited bias toward defendant, instead finding her testimony on this issue credible.[694] She testified that she was concerned with his well-being throughout the trial and tried to protect him.[695] The court of appeals deferred to the trial court's factual findings and found the defendant had not established his claim.[696]

Finally, Gioglio argued that his defense attorney was ineffective for failing to cross-examine the victim in the case.[697] The court of appeals, on the other hand, sided with the trial court, finding numerous valid reasons why a competent lawyer would choose not to cross-examine a witness.[698] For instance, the court noted that defense counsel may not want to appear as bullying the witness, or might want to avoid highlighting damaging testimony against her client.[699] The trial court found that defense counsel's decision was a "reasonable trial strategy."[700] Because the trial court was in a better position to judge credibility, the court of appeals deferred to its findings, and held that Gioglio had failed to establish his claim.[701] The appellate court concluded that he had not established ineffective assistance of counsel under *Strickland*.[702]

In *People v. Douglas*, the court of appeals vacated defendant's convictions for first and second degree criminal sexual conduct due to his attorney's ineffective assistance of counsel.[703] During defendant's trial, his attorney failed to object to the improper hearsay testimony of several witnesses, did not impeach the child victim with her preliminary examination testimony, and did not tell defendant he would be sentenced to a twenty-five year mandatory minimum sentence if he were convicted of first-degree criminal sexual conduct.[704]

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692. *Gioglio*, 296 Mich. App. at 24-25.
693. *Id.* at 25.
694. *Id.*
695. *Id.* 25-26.
696. *Id.* at 26.
697. *Id.*
698. *Gioglio*, 296 Mich. App. at 26.
699. *Id.*
700. *Id.* at 27.
701. *Id.* at 27-28.
702. *Id.* at 28.
703. People v. Douglas, 296 Mich. App. 186, 191; 817 N.W.2d 640 (2012).
704. *Id.* at 199.

The court of appeals found that the defendant was denied the effective assistance of counsel.[705] Defense counsel testified at an evidentiary hearing that his trial strategy was to convince the jury that the victim was not credible, and that the victim's mother coached her to make the allegations.[706] Defense counsel asserted his failure to object to the testimony of the witnesses supported his trial strategy because their testimony showed the victim changed her story many times.[707] The court rejected these assertions, noting that counsel's failure to object to hearsay testimony fell below an objective standard of reasonableness because the witness testimony was mostly consistent, and did not show the victim had changed her story.[708]

Further, defense counsel's failure to inform the defendant that he was facing a twenty-five-year mandatory minimum sentence upon conviction, also fell below an objective standard of reasonableness, the court found.[709] The court concluded that "the information regarding the mandatory minimum sentence was essential to enable defendant to make an informed decision about whether to accept the prosecution's plea offer or proceed to trial.[710] The court directed the prosecution to reinstate the plea offer of permitting a guilty plea to fourth-degree criminal sexual conduct, with a possible sentence of ten months in jail.[711]

XIV. THE MICHIGAN SEX OFFENDER REGISTRATION ACT

A. Lack of Residence

In *People v. Dowdy*, the defendant was a convicted sex offender.[712] He was charged with failure to comply with the Sex Offenders Registration Act (SORA).[713] Specifically, he was charged with violating the reporting and notification requirements of the statute[714] by failing to

705. *Id.* at 191.
706. *Id.* at 200.
707. *Id.*
708. *Id.*
709. *Douglas*, 296 Mich. App. at 205.
710. *Id.* at 206 (citing People v. Corteway, 212 Mich. App. 443, 446; 538 N.W.2d 60 (1995)).
711. *Id.* at 207.
712. People v. Dowdy, 489 Mich. 373; 802 N.W.2d 239 (2011).
713. 489 Mich. 373, 376-77; 802 N.W.2d 239 (2011) (citing MICH. COMP. LAWS ANN. § 28.722(e) (West 2012)).
714. *See* MICH. COMP. LAWS ANN. § 28.725(1)-(2) (West 2012).

register his living address with the police.[715] The trial court dismissed the charges and the prosecutor appealed.[716]

The court of appeals affirmed.[717] The court held that because the defendant did not have a residence at which to register, he could not comply with SORA's reporting requirements.[718] The court reasoned the legislature had written the reporting requirements for those who had a residence, and it urged legislators to change the language of SORA for the homeless to comply.[719]

The Michigan Supreme Court reversed.[720] The court noted that SORA defines "residence" for "registration and voting purposes" as "that place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging."[721] The court found that even a homeless offender can report to the police where he is staying, and the state police permit homeless sex offenders to register their domicile as "123 Homeless."[722] The court concluded that the defendant was not prevented by his homelessness from complying with SORA, because he could walk into a police station and report where he was living.[723] The court further stated that the defendant was required to report in person to a law enforcement agency four times per year.[724]

In a separate dissent, Justice Kelly wrote that the court of appeals properly held that, as a matter of law, defendant could not have complied with SORA's registration and reporting requirements.[725] The Michigan State Police order that allows sex offenders to register with an address of 123 Homeless renders SORA meaningless, because any sex offender who wants to keep their location private can register at that fictitious address, she wrote.[726] "Compliance for compliance's sake is worthless if it provides no valuable practical information" she stated.[727] She noted that because the state police order goes against the language of SORA, the order is unlawful.[728] She would find the defendant could not be held

715. *Dowdy*, 489 Mich. at 377.
716. *Id.* at 378.
717. *See* People v. Dowdy, 287 Mich. App. 278, 279; 787 N.W.2d 131 (2010), *rev'd*, 489 Mich. 373; 802 N.W.2d 239 (2011).
718. *Id.* at 281-82.
719. *Id.* at 282.
720. *Dowdy*, 489 Mich. at 376.
721. *Id.* at 382.
722. *Id.* at 386.
723. *Id.* at 386-87.
724. *Id.* at 388.
725. *Id.* at 393-94.
726. *Dowdy*, 489 Mich. at 410 (Kelly, J., dissenting).
727. *Id.*
728. *Id.*

criminally liable for his failure to register or report under SORA, and that the trial court did not abuse its discretion by granting defendant's motion to quash the information.[729] She concluded that the majority's interpretation of SORA is not faithful to its language, and that it "defies SORA, the Michigan State Police order, and common sense."[730]

B. Delayed Ordering of Registration as Sex Offender

In *People v. Lee*, the defendant was sentenced for third-degree child abuse[731] and placed on five years of probation.[732] At sentencing, the prosecutor argued that the defendant should be required to register as a sex offender under Michigan's Sex Offenders Registration Act (SORA)[733] because of information she had received from the victim's family.[734] The trial court stated that if the prosecutor wanted to have a hearing on the issue at a later date, the court would hear testimony before ruling.[735] Over a year after the sentencing, the prosecution filed a motion requesting that defendant be required to register as a sex offender.[736] After hearing testimony, the trial court granted the motion and ordered defendant to register under SORA. The defendant appealed.[737]

The court of appeals affirmed.[738] The court adopted the view of the prosecution, which urged the appellate court to view registration under SORA not as a punishment or part of the sentence, but as a regulation to protect the public.[739] The court cited two federal court decisions[740] that held that the registration and notification requirements of Michigan's SORA are not punishment under the Eighth Amendment of the United States Constitution.[741] Rather, the court found case law that supported the

729. *Id.* at 411.

730. *Id.*

731. MICH. COMP. LAWS ANN. § 750.136b(5) (West 2012).

732. People v. Lee, 489 Mich. 289, 292; 803 N.W.2d 165 (2011).

733. MICH. COMP. LAWS ANN. § 28.721-.736.

734. *Lee*, 489 Mich. at 293. Specifically, the court found that the evidence established that the "defendant intentionally touched the [child's genitals] in order to inflict humiliation or out of anger." *See* People v. Lee, 288 Mich. App. 739, 746; 794 N.W.2d 862 (2010). Defendant acknowledged that he did this as a form of "bullying" because he was frustrated that the child would not put his pajamas on. *Id.*

735. *Id.*

736. *Id.*

737. *Id.* at 294.

738. *Lee*, 288 Mich. App. at 740.

739. *Id.* at 742-44.

740. Doe v. Kelley, 961 F. Supp. 1105, 1109 (W.D. Mich. 1997) and Lanni v. Engler 994 F. Supp. 849, 854 (E.D. Mich. 1998).

741. *Id.* at 743 (quoting *In re* Ayres, 239 Mich. App. 8, 14; 608 N.W.2d 132 (1999)).

trial court's decision in this case, and believed that such judicial fact-finding did not violate defendant's due process rights.[742] The court concluded that "registration under SORA is not a part of defendant's sentence, nor is it a condition of probation; rather, it is a ministerial function designed to protect the public from sex offenders."[743] In reaching this conclusion, the appellate court glossed over the fact that the defendant was not a convicted sex offender, but had been convicted of child abuse.[744] The court chose to focus on the procedural aspects of the trial court's order.[745] Finding no prior case law.

Addressing the procedural propriety of requiring registration over a year after the original sentencing, the court reached its own conclusion: as long as the trial court has jurisdiction of the defendant's case, it may order registration under SORA.[746] Defendant appealed.[747]

The Michigan Supreme Court reversed.[748] The court rejected the appellate court's conclusion that there was nothing improper with requiring the defendant to register twenty months after sentencing.[749] The trial court committed several procedural errors, the supreme court noted, including failure to require the defendant register before sentencing; failure to explain defendant's registration duties under SORA to him; failure to determine whether the state police had received defendant's registration prior to sentencing; and failure to include in the judgment its decision that the crime was a listed offense for which SORA registration was required.[750] In addition, there is no procedure in SORA which allows the trial court to hold a post-sentencing hearing in order to determine registration, the court found.[751]

Due to these procedural errors, the judgment of sentence was probably invalid, the court noted.[752] However, the prosecutor did not seek to correct the sentence within the time period allowed by the court

742. *Id.* at 743-44 (citing People v. Althoff, 280 Mich. App. 524, 540-42; 760 N.W.2d 764 (2008)).

743. *Id.* at 744.

744. *Id.* at 744-45.

745. *Lee*, 288 Mich. App. at 744.

746. *Id.* The Michigan Supreme Court subsequently granted defendant's application for leave to appeal in *People v. Lee*, 488 Mich. 953; 790 N.W.2d 823 (2010).

747. *Id.*

748. *Lee*, 489 Mich. at 301.

749. *Id.* at 297.

750. *Id.* at 298.

751. *Id.*

752. *Id.*

rules, which is six months from entry of the judgment of conviction.[753] Therefore, the prosecutor's motion should have been denied.[754]

XV. CONCLUSION

The cases presented in this Article were carefully reviewed and thoroughly analyzed by the appellate courts. Each case is important because it represents an important decision in the area of criminal law jurisprudence, and adds to our understanding of that area of law.

753. *Id.* at 299 (quoting MICH. CT. R. 6.429(B)(3)).
754. *Lee*, 489 Mich. at 299.